No. 85-2014

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

MICHAEL VAN McDOUGALL,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

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QUESTIONS PRESENTED

I.

WHETHER A DEFENDANT MAY BE SENTENCED TO DEATH WHEN HIS LEAD COUNSEL AT TRIAL HAD IN THE SIX MONTHS PRIOR TO TRIAL TWICE BEEN THE SUBJECT OF STATE BAR SUSPENSION ORDERS; MADE NUMEROUS VISITS TO THE HOSPITAL EMERGENCY ROOM AND INGESTED MIND ALTERING DRUGS DURING THE DEFENDANT'S TRIAL; ENGAGED IN ILLEGAL AND UNETHICAL BEHAVIOR DURING HIS REPRESENTATION OF DEFENDANT; AND DELIVERED AN INCOHERENT AND OFFENSIVE CONCLUDING SUMMATION DURING THE SENTENCING HEARING.

II.

WHETHER A DEFENDANT MAY BE SENTENCED TO DEATH UNDER A SYSTEM WHICH ALLOWS JURORS TO RETURN VERDICTS OF THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER EVEN WHEN THERE IS NO EVIDENCE PRESENTED TO SUPPORT THE LESSER VERDICT.

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IN THE

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October Term, 1985

MICHAEL VAN McDOUGALL,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

Petitioner Michael Van McDougall, respectfully prays that a writ of certiorari be issued to review the judgment of the Superior Court of Mecklenburg County, North Carolina in this case.

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion and Order of the Superior Court of Mecklenburg County, North Carolina, denying petitioner's motion for appropriate relief is unreported but is attached as Appendix A.

The Order of the North Carolina Supreme Court denying petitioner's petition for writ of certiorari to review the judgment of the Superior Court of Mecklenburg County is not yet reported, but is attached as Appendix B.

JURISDICTION

The Order of the North Carolina Supreme Court denying petitioner's petition for writ of certiorari was entered

in conference on April 7, 1986, and was issued on April 14, 1986. A copy is attached as Appendix B. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3). Petitioner has asserted below and now asserts a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense;

the Eight Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;

and the Fourteenth Amendment, which provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. The Course of Prior Proceedings

Petitioner was convicted of first-degree murder, kidnapping, and assault with a deadly weapon in the Superior

Court of Mecklenburg County, North Carolina, at the 9 June 1980 session. He was sentenced to death for murder and given prison sentences for the other charges.

Petitioner appealed to the North Carolina Supreme Court, which affirmed the convictions and sentence of death. *State v. McDougall,* 308 N.C. 1, 301 S.E.2d 308 (1983) (Exum-J., dissenting as to the sentence of death). This Court denied certiorari in *McDougall v. North Carolina,* 464 U.S. 865, 104 S.Ct. 147, 78 L.Ed.2d 865 (1983).

Petitioner filed a post-conviction proceeding in the Superior Court of Mecklenburg County on 27 February 1984, in the form of a "motion for appropriate relief" pursuant to N.C.G.S. §15A-1411 *et seq.* After an evidentiary hearing on the claims, before the Honorable Frank W. Snepp, the Superior Court of Mecklenburg County denied petitioner's claims by order entered August 9, 1985 (Appendix A). Petitioner filed a timely petition for writ of certiorari in the North Carolina Supreme Court which was denied without opinion by order entered 7 April 1986 (Appendix B).

B. The Evidence Presented at Trial

In the early morning hours of 21 August 1979 petitioner was arrested and charged with killing one young woman and seriously injuring another in a knife attack that took place in the community where he resided with his wife and child. Petitioner was arrested at the scene and did not deny involvement in the tragedy. His plea of not guilty by reason of insanity was not accepted by the jury's special verdict. After three weeks of trial, petitioner was acquitted on some charges, but convicted of first-degree murder, kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury.

At the sentencing hearing, petitioner offered evidence of mental problems exacerbated by heavy ingestion of cocaine on the evening of 20 August 1979. The jury found both aggravating and mitigating factors. However, under North Carolina law, because the jury determined that the mitigating factors did not outweigh the aggravating factors, the imposition of the death sentence was automatic.

C. **The Evidence Presented in Post Conviction Hearing**

Petitioner presented evidence at the hearing on his motion for appropriate relief that the unique set of circumstances which infected his trial combined to compel the conclusion that petitioner was effectively denied representation of counsel by operation of law.

The evidence showed that shortly after petitioner's arrest his family retained a Charlotte civil attorney, Wallace Osborne, who associated criminal lawyer Michael Scofield. Osborne and Scofield began preparation for the trial, focusing their effort on the penalty phase presentation.

At that time, Jerome "Jerry" Paul was not involved in petitioner's defense. Rather, Paul was fending off his own legal problems from five ethical complaints filed against him by the North Carolina State Bar. In this regard, the Superior Court found that Paul had for a long time suffered from severe migraine headaches. In 1977, after the illness and death of his son, Paul also experienced deep depression. In May, 1979, feeling he was no longer able to practice law, he moved to New York. While in New York he was under psychiatric treatment and was hospitalized for migraine on several occasions. During this period, Paul neglected his professional duties. As a result grievances were lodged against him with the North Carolina State Bar, and disciplinary proceedings were instituted.

These proceedings were pending against Paul during his representation of petitioner. (App. A, p. 5a)

In November 1979, Paul failed to appear at a hearing before the State Bar on these charges, sending word through his psychiatrist, Dr. Teich, that he was disabled from repeated, severe migraine headaches which intermittently rendered him unable to function even with a reduced workload prescribed by the physician.[1]

The Disciplinary Hearing Committee nevertheless took evidence at the November hearing and, upon finding that Paul had failed to provide legal services for which he had charged clients, ordered Paul suspended from the practice of law in North Carolina for two years effective 9 November 1979. In February 1980, Paul finally responded to the disciplinary charges, filing pleadings in each of the five cases, including a request to reopen the November hearing, asserting that he had been "incapacitated," and "physically and psychologically" unable to deal with the complaints prior to that time.[2]

In a disciplinary hearing on four of the charges, before the State Bar in May 1980, just one month before petitioner's trial, Dr. Teich testified that Paul became totally "incapacitated" while experiencing migraines and that he was "depressed" and "suicidal." After this second round of hearings, Paul was given two reprimands and his license to practice law was suspended a second time on May 23, 1980. (App. A, p. 6a)

It was during the Spring of 1980, while defending against the State Bar's charges, that Paul met with peti-

[1] Supporting documentation for all references to Paul's disciplinary proceedings is found in the State Bar records that were accepted into evidence as Petitioner's Exhibit #1 below and which were certified to the North Carolina Supreme Court.

[2] Footnote one, *supra.*

tioner in the state mental hospital. Paul advised McDougall that he had tried 150 first degree capital cases, including 16 insanity defenses, and "won them all." He also falsely told petitioner's family that Scofield and Osborne "hadn't done anything." (T 227)[3] Paul told petitioner he would come into the case only if he were "to have control" (T 227); to the family, Paul painted a picture of desperation and an inevitable loss if he was not retained. (T 65) The Superior Court found that:

> Jerry Paul during the period of his representation of defendant violated a number of the canons of the Code of Professional Responsibility of the North Carolina State Bar. By "puffing his wares" to defendant and his mother, he violated DR2-101(A), and DR2-103(A)(1) and (C). . . (App. 4, p. 14a)

So, while then-lead counsel was on vacation, Paul got himself hired to represent petitioner. He immediately took command, assigning Scofield to a "secondary role" and Osborne's role to "virtually nothing." (T 121-122)

Paul totally disregarded the other lawyers' views (T 131), completely changed the case strategy and decided to go for acquittal based on a strange insanity theory that he evolved with Dr. Teich. (T 132)

About the same time, Paul went to Georgia to interview petitioner's family. There, the suspicions of Paul's drug use (which was later confirmed) first surfaced. After long visits to the bathroom, Paul would emerge mumbling unintelligibly (T 67) and would lose contact with family members. (T 248) At one point, while supposedly seeking a breath of fresh air, Paul crashed through both the window and storm window in petitioner's mother's house. (T 67)

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[3]Transcript references are to the transcript of proceedings in the post-conviction hearing in Mecklenburg County Superior Court.

On 23 May 1980 a third State Bar hearing was convened — this time to reconsider Paul's original suspension. Paul offered testimony about lights flashing in his mind, a debilitating depression, indescribable pain, and his need to lie in bed "anywhere from two to three days to a week or so" after experiencing migraines. The Disciplinary Hearing Committee entered an order, sustaining the November 9 suspension of Paul's license, on June 9, 1980 — the day that petitioner's trial began in Charlotte.[4]

Petitioner's trial was a placid surface that masked deeply troubled waters. Paul's strange behavior caused shouting matches between counsel (T 68), a complete revamping of the defense strategy (T 134), and a near fist fight between petitioner and one of the lawyers about Paul's insistence on filing a federal suit, while the trial was in progress, against the presiding judge. (T 125) In short, petitioner's lawyers admitted to "fighting with each other all the time." (T 141)

A juristic psychologist and a clinical psychologist working for the defense, both of whom have testified in many previous cases, told about the "turmoil" (T 38), "antagonism" (T 39), and "hostility," (T 48), as well as a total lack of witness preparation by counsel. (T 47, 102)

During the conduct of the trial, Paul became acutely ill, frequenting local hospitals, taking a large amount of prescription drugs, and also taking illegal drugs. The Superior Court found that the evidence showed Paul had attacks of migraines during the trial; that on four occasions in June and five in July he received treatment for the condition at the emergency rooms of Charlotte hospitals; and medications, including narcotics, were administered to him under a doctor's supervision. (App. A, p. 8a).

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[4]Footnote one, *supra.*

Records subpoenaed for the post-conviction hearing showed Paul received emergency room treatment for migraine headaches on at least the following dates during the trial: 11 June, 14 June, 15 June, 26 June, 4 July, 7 July, 14 July, 16 July, and 20 July. (T 180) The local director of the Charlotte Treatment Center noted the following drugs which were prescribed for Paul during the trial: Phenergan, Motrin, Demerol, Nitrous Oxide, Tylenol with codeine, Percocet, Gynergen, Dilaudid, and Compazine. Demerol is "a synthetic narcotic, very similar to morphine"; Phenergan "usually doubles the effectiveness of the narcotic given with it"; Percocet is a "synthetic narcotic substance" which is also "potentiated" or doubled in effect by the Phenergan; and by Gynergen and Compazine as well. (T 197)

Paul's illness and drug use affected his performance at petitioner's trial. As the case wore on, the headaches came more frequently and Paul had to leave court more often. (T 173) At least once, Paul did not show up at all on the morning he was to examine an expert. (T 128) On other occasions he walked out complaining of not being able to tolerate the pain; co-counsel would later find him sprawled on the floor of their office sound asleep. (T 136) One expert, who took Paul on one of his emergency room trips, said he acted "zonked out" like a "zombie." (T 45)

During the trial, petitioner's mother confronted Paul, who admitted giving McDougall illegal drugs (T 76) – and Paul did so again later, in a holding cell near the courtroom. (T 230) The Superior Court specifically found that "[a]ccording to the testimony of the defendant, Paul also committed the felony of furnishing a controlled substance to an inmate of a jail, in violation of N.C.G.S. 14-258.1,". (App. A, p. 14a) After learning from a deputy sheriff about Paul's drug dealings in the jail, Scofield stopped

meeting with petitioner and Paul during the trial, "to protect my reputation." (T 131)[5]

Whether or not in response to the large amount of drugs he was taking, Paul repeatedly importuned petitioner (T 232), petitioner's wife (T 233), and petitioner's mother (T 72) to commit perjury to support the insanity defense he had concocted. In violation of the trial judge's specific order, Paul gave certain tapes to the television station, asserting that if he couldn't win the case in the courtroom, he would win it in the news media. (T 74) The Superior Court found that Jerry Paul violated ethical standards by his statements to the media, DR7-107, and by suggesting perjury to witnesses. (App. A, p. 14a)

Finally, assigning himself the final argument, Paul embarked on a rambling, disjointed personal history in which he portrayed himself as a great civil rights leader. He said little or nothing reasonably calculated to encourage the jury to spare petitioner's life. Paul's argument included such statements as:

> . . . the death penalty is the tool of the Facists . . . why do you think that Facists want the death penalty? It's because they can kill the minorities . . . Every human being who believes in capital punishment loves killing, and the only reason they believe in capital punishment is because they get a kick out of it . . . we did a long study on Nazi Germany to discover why people turn to Facism and turn to Nazism . . . one of the dividing lines, the main one, was whether or not you're in favor of the death penalty . . . those

[5]Paul had previously banished Osborne from strategy sessions because of a concern that he was a spy for the prosecution (T 210), thus leaving Paul as the only attorney meeting with petitioner.

> people who were in favor of the death penalty are most apt to become Fascists . . . .

(App. C, p. 4c, 7c, 13c)

Regarding Paul's closing argument, although the Superior Court found that overall the argument was within the range of competence of attorneys, the Court also found:

> The speech was polemical – a direct, frontal attack against the death penalty. In strong language, Paul labelled it an instrument of a ruling class used against minorities, such as blacks, and to which he, as a "freedom fighter" and disciple of Martin Luther King, was vehemently opposed. It abounded with references to his personal beliefs and disbeliefs, political, social and religious, in defiance of DR7-106C(4) of the *Code of Professional Responsibility.*

(App. A, p. 18a)

Scofield described Paul's closing as "tactless, ill-advised, stupid. . . ." (T 129) and Osborne testified it was "extremely foreign to my philosophy and my beliefs." (T 212-213)[6] Both co-counsel thought the result would have been, or might have been, different if Paul had not entered the case

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[6]In an Affidavit filed at the hearing before the Superior Court, Charlotte attorney Allen Bailey, a trial lawyer for 34 years and past president of the N.C. Academy of Trial Lawyers, concluded that Paul's closing argument "failed to meet the standard of legal practice in Mecklenburg . . . or any other county in the state . . . ." He viewed the argument as "so outrageous in and of itself that it makes Paul's performance as Counsel, at least during the penalty phase, inadequate and incompetent."

Judge Ferrell, the presiding judge at petitioner's trial, stated in a counter-affidavit filed by the State, that Jerry Paul's argument was appropriate and within the range of competence.

and carried on his string of drug-induced bizarre behavior. (T 140, 157)

In conclusion the Superior Court found that:

> [I]f the issue before me were the ethical and moral behavior of Jerry Paul, I would under the evidence find him guilty as charged by the defendant in those respects.
>
> That is not the issue. The question is whether Paul's transgressions resulted in the defendant's being denied his constitutional right to effective assistance of counsel. I have determined that they did not. Other aspects of his behavior must be left to another tribunal.
> (App. A, p. 26a)

DISCUSSION OF QUESTIONS PRESENTED

I.

WHETHER A DEFENDANT MAY BE SENTENCED TO DEATH WHEN HIS LEAD COUNSEL AT TRIAL HAD IN THE SIX MONTHS PRIOR TO TRIAL TWICE BEEN THE SUBJECT OF STATE BAR SUSPENSION ORDERS; MADE NUMEROUS VISITS TO THE HOSPITAL EMERGENCY ROOM AND INGESTED MIND ALTERING DRUGS DURING THE DEFENDANT'S TRIAL; ENGAGED IN ILLEGAL AND UNETHICAL BEHAVIOR DURING HIS REPRESENTATION OF DEFENDANT; AND DELIVERED AN INCOHERENT AND OFFENSIVE CONCLUDING SUMMATION DURING THE SENTENCING HEARING.

A. How The Federal Question Was Raised And Decided Below.

Petitioner's complaints about the constitutionality of his representation by his attorney, Jerry Paul, were raised generally in his Motion for Appropriate Relief and were argued extensively in his Memo filed with the Superior

Court. The state did not file a response to petitioner's Motion for Appropriate Relief, but argued these issues in the State's Brief in Opposition to Motion for Appropriate Relief. The Superior Court denied petitioner's contentions on this issue on the merits (Appendix A).

On petition for certiorari to the North Carolina Supreme Court from this denial, the merits of the issue were again briefed and presented by both parties. The petition for writ of certiorari was denied without opinion. (Appendix B)

B. **Reasons For Granting The Writ.**

In *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), this Court held that there are cases where the circumstances surrounding the representation of a defendant by counsel are such as to justify a presumption of prejudice. *Id.,* 104 S.Ct. at 2048, 80 L.Ed.2d at 669. Given the uncontradicted evidence regarding the circumstances which surrounded petitioner's representation by Paul, the question presented here is whether the presumption recognized in *Cronic* should be applied to overturn petitioner's sentence of death.[7]

As the Superior Court found, during the months prior to petitioner's trial Jerry Paul, who talked his way into the role of lead counsel by "puffing his wares" (App. A, p. 14a), was twice ordered suspended by the North Carolina State Bar for neglect of his professional duties. The last suspension was entered just weeks before petitioner's trial (App. A, p. 6a). The Superior Court found, however, that

[7]In the proceedings below petitioner raised this claim as a challenge to both his conviction and sentence. In this Court petitioner only challenges the validity of his death sentence.

because Paul "took advantage of every procedure possible to defer a final decision as to his suspension from practice" (App. A, p. 7a), petitioner's claim that he was denied the assistance of counsel because he was represented by an unlicensed attorney had to be rejected (App. A, p. 8a). Petitioner does not here challenge this determination of state law.

This Court has emphasized that the full realization of a defendant's right to counsel is a prerequisite for a fair trial, both under the due process clause of the Fourteenth Amendment and the Sixth Amendment right to counsel. *Powell v. Alabama,* 287 U.S. 45, 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed 158, 170 (1932); See, also: *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Though this Court has never issued an opinion directly on point, there is strong authority from federal and state courts that representation by an unlicensed attorney is not the representation of counsel contemplated by the Sixth Amendment; *See,* e.g. *Solina v. United States,* 709 F.2d 160 (2nd Cir. 1983) *Harrison v. United States,* 359 F.2d 214 (D.C. Cir. 1965); *Huckleberry v. State of Florida,* 337 So.2d 400 (Fla.App. 1976); *Baker v. State,* 130 P. 820 (Okl. 1912). The fact that petitioner's lead counsel had actually been ordered suspended from practice at the time of petitioner's trial, considered in light of the other circumstances at petitioner's trial, compels a finding that the petitioner's right to counsel was not adequately protected.

At the time of petitioner's trial the North Carolina State Bar had already determined that Paul should not have been allowed to represent a defendant in even the most insignificant misdemeanor case. Paul's presence therefore as lead counsel in petitioner's capital case both erodes con-

fidence in the outcome of the sentencing proceeding required by the Sixth Amendment, *Strickland v. Washington, supra,* and undermines the reliability of the process which led to the imposition of the death penalty, in violation of the Eighth Amendment. See e.g., *Spaziano v. Florida,* 468 U.S. ____,. 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340, 349 (1984); *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976).

The State Bar's judgment that Paul was unfit to practice law is but one circumstance that petitioner relies on to invoke a presumption of prejudice. Of equal importance are Paul's activities during the petitioner's trial and sentencing hearing which demonstrated that Paul's unfitness to fulfill his professional responsibilities continued throughout the course of those proceedings.

At that hearing on petitioner's motion for appropriate relief, petitioner presented evidence of Paul's impaired physical state at the time of petitioner's trial and Paul's ingestion of narcotic drugs. Ironically, in the weeks before petitioner's trial, Paul defended himself before the State Bar, against the charges that he neglected his other clients' interests, on the basis that he had been rendered incompetent by his severe migraine headaches. The Superior Court noted that Paul and his physician assumed Paul had recovered from this condition prior to petitioner's trial. However, that assumption is belied by the Court's further finding that migraines caused Paul to make nine trips to a hospital emergency room during petitioner's trial and that during this time Paul ingested a number of medications, including narcotics. (App. A, p. 8a)

The Superior Court, after reviewing all of the evidence at the hearing on petitioner's motion for appropriate relief, also found that during petitioner's trial Paul had violated a number of ethical standards of the North Carolina

State Bar and may even have committed a felony during the course of his representation of petitioner (App. A, p. 14a)

Recently, in *Nix v. Whiteside*, 475 U.S. ____, 106 S.Ct. 988, 994, 89 L.Ed.2d 123, 134 (1986) Chief Justice Burger, after affirming that ". . . breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel", noted that "[i]n some future case challenging attorney conduct in the course of a state court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the State in statute or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct." Petitioner's case provides this Court with a compelling opportunity to decide this question.

Finally, there is Paul's argument to the jury at the end of petitioner's sentencing trial. This disjointed and patently offensive oration, which had little to do with petitioner or the crime at issue and much to do with Paul's vision of his own place in history, amply demonstrates that Paul was severely impaired. His physical, mental, legal and ethical problems truly rendered him incapable of fulfilling his legal obligations to petitioner.

No defendant should be sentenced to death when being represented by an attorney who had twice been the subject of State Bar suspension orders, who was physically incapacitated by illness and medications at the time of that defendant's trial, who violated legal and ethical standards throughout that defendant's trial, and who was demonstrably unfit to represent any client in a court of law. The Sixth, Eighth, and Fourteenth Amendments all compel a decision that a death sentence entered under these circumstances cannot be allowed to stand.

II.

WHETHER A DEFENDANT MAY BE SENTENCED TO DEATH UNDER A SYSTEM WHICH ALLOWS JURORS TO RETURN VERDICTS OF THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER EVEN WHEN THERE IS NO EVIDENCE PRESENTED TO SUPPORT THE LESSER VERDICT.

A. How The Federal Question Was Raised And Decided Below.

Petitioner pleaded in his Motion For Appropriate Relief that the capital punishment scheme in effect in North Carolina at the time of his trial violated the Eighth and Fourteenth Amendments because juries in premeditated and deliberated first degree murder cases were always instructed to consider a verdict of second degree murder, even if there was no evidence presented at the trial to support such a verdict. The Superior Court denied this contention, finding that the evidence at petitioner's trial supported submission of the second-degree verdict to the jury. The Superior Court referred to N.C.G.S. §15A-1419(a)(3), which permits, but does not require, a finding of waiver if an issue was not raised on direct appeal, but did not specifically rely on this provision.[8] Instead, the Superior Court ruled on the merits of the Motion.[9] (Ap-

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[8]After rejecting petitioner's contentions on the merits, and before again ruling on the merits, the Court stated: "Finally, as to this contention the defendant was in a position to adequately raise this issue upon appeal, but did not do so, N.C.G.S. §15A-1419(a)(3)." This statute authorizes a judge to deny a Motion for Appropriate Relief upon a finding that the issue was not raised in a previous appeal, but subsection (b) of the statute makes clear that this is a discretionary decision: the judge "may" deny relief but is not required to do so.

[9]After the above reference to N.C.G.S. §15A-14191(a)(3), the Superior Court stated: "Therefore, I conclude that this contention is without merit, as a matter of law.' (App. A, p. 23a)

pendix A) The issue was again raised and briefed in petitioner's Petition For Writ of Certiorari to the North Carolina Supreme Court. That petition was denied without opinion. (Appendix B)

B. **Reasons For Granting The Writ.**

In 1980, at the time of petitioner's trial, whenever a defendant was tried in North Carolina for first degree murder on the theory of premeditation and deliberation the trial court was required to instruct the jury on second degree murder. The jury had to be allowed to return a verdict of second degree murder, even if there was no evidence at all to support the charge on the lesser offense. *State v. Poole,* 298 N.C. 254, 258 S.E.2d 339 (1979); *State v. Keller,* 297 N.C. 674, 256 S.E.2d 710 (1979); *State v. Harris,* 290 N.C. 718, 228 S.E.2d 424 (1976). This requirement of the automatic submission of a lesser included offense regardless of the evidence was limited to first degree murder cases. *State v. Keller,* 297 N.C. at 678, 256 S.E.2d at 713.

This automatic inclusion rule renders the North Carolina death penalty scheme in effect at the time of petitioner's trial and sentencing unconstitutional under *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), because it allowed juries to capriciously, arbitrarily, and without proper standards choose which defendants would live and which would die. This exact procedure was held unconstitutional in *Roberts v. Louisiana,* 428 U.S. 325, 334-335, 96 S.Ct. 3001, 3006-7, 49 L.Ed.2d 974, 982 (1976), where a plurality of this Court held that such a procedure "invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate" and thus allows for a capricious and arbitrary exercise of a capital

jury's sentencing discretion. This holding was reaffirmed by a seven-member majority of this Court six years later in *Hopper v. Evans,* 456 U.S. 605, 611, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367, 373 (1982).

In 1983, in *State v. Strickland,* 307 N.C. 274, 298 S.E.2d 645 (1983), the North Carolina Supreme Court acknowledged that the practice of automatically instructing jurors on second degree murder in every first degree premeditated and deliberated murder case was "suspect of being constitutionally impermissible" under *Roberts* and *Hopper,* and struck down this practice. *Id.* 307 N.C. at 289-290, 298 S.E.2d at 655-56. In doing so the North Carolina Supreme Court acknowledged that this practice had been in effect from at least 1976 until 1983, a period which includes the time of petitioner's trial.

The Superior Court based its denial of petitioner's claim regarding this "automatic instruction" rule on the basis that there was evidence at petitioner's trial that warranted submission of the second degree verdict. The argument that there is no constitutional violation if the second degree verdict is properly considered was adopted by the North Carolina Supreme Court in *State v. Kirkley,* 308 N.C. 196, 222, 302 S.E.2d 144, 159 (1983).

This position totally misreads this Court's opinion in *Roberts.* In both *Roberts* and *Furman* this Court held that *any* death sentences obtained under a system which permits juries to arbitrarily and capriciously choose which defendants are to die *must* be invalidated. *Roberts* was specifically concerned with the *systemic* arbitrariness contained in a system which allowed a jury to return an unsupported lesser verdict, and thus to avoid even the consideration of the death peanlty, in every murder case. The issue is not whether the lesser verdict is supported in any

single case, but whether the system as a whole is operating to eliminate, or at least lessen, the presence of arbitrariness and caprice.

This case therefore presents this Court with an opportunity to decide whether the dictates of the Eighth Amendment as elucidated in *Furman* and *Roberts* were being complied with in North Carolina at the time of petitioner's trial. It is an issue of great importance which requires an analysis of the application of fundamental Eighth Amendment jurisprudence, and it is one which requires review by this Court.

CONCLUSION

Petitioner was sentenced to death in a trial where he was represented by counsel who had twice been subject to State Bar suspension orders, who during petitioner's trial was physically impaired by illness and medications, and who violated ethical standards throughout petitioner's trial. Review by this Court should be granted to determine whether these circumstances effectively denied petitioner representation by counsel as a matter of law.

Further, petitioner was sentenced to death under a capital punishment scheme that required juries in premeditated and deliberated first degree murder cases to consider a verdict of second degree murder regardless of the evidence. This Court should grant review to whether this violated petitioner's Eighth Amendment rights.

For these reasons, petitioner respectfully prays that the Court grant the writ of certiorari.

Respectfully submitted,

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June 6, 1986

APPENDIX A

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF MECKLENBURG	SUPERIOR COURT DIVISION
	79-CRS-47697
	79-CRS-4773
	79-CRS-67081

STATE OF NORTH CAROLINA)
)
vs.)
)
MICHAEL VAN McDOUGALL,)
)
Defendant)

The defendant filed a motion for appropriate relief 27 February 1984. Pursuant to order of the court, a plenary hearing was held before me at Charlotte on 13 November 1984. The defendant, represented by James C. Fuller of the Wake County Bar, and Richard Rosen, of the Orange County Bar, was present. The State was represented by Joan Byers and Barry McNeill, of the Attorney General's office, and by Gentry Caudill, Assistant District Attorney, Twenty-Sixth Judicial District.

Evidence was presented by the defendant and the State. At its conclusion, it was stipulated that each party could submit further documentary evidence; that I would then hear arguments, and enter my order out of term and out of district.

Due to scheduling conflicts, final arguments were, by agreement, heard 29 July 1985, in Asheville.

I. CONTENTIONS:

The defendant, in his motion, contended that he was denied his constitutional rights in four respects. Two, based upon the trial court's refusal to grant continuances, were specifically abandoned at the hearing.

1. The defendant was denied his right to effective assistance of counsel in that;

   A. His lead counsel, Jerry Paul, was not licensed to practice law in North Carolina at the time of his trial.

   B. Paul was mentally and physically incapacitated during the trial.

   C. Paul had conflicts of interest.

   D. Paul's unethical conduct during the trial amounted to a deprivation of effective assistance of counsel and the Court, under its supervisory power over attorneys, should award defendant a new trial.

   E. Paul's closing argument at the penalty phase constituted actual ineffective assistance of counsel.

2. The death penalty is arbitrarily and discriminatorily applied in North Carolina;

   A. As to the defendant, since its imposition upon him was disproportionate when compared to other cases.

   B. As to defendant, since the jury was permitted to consider a verdict of guilty of second degree murder.

   C. In general, because the death penalty is so applied in North Carolina.

I consider the contentions in the above order.

II. **BACKGROUND:**

The defendant was, at the 9 June 1980 Session of the Superior Court, Mecklenburg County, convicted of assault with a deadly weapon with intent to kill inflicting serious injury, kidnapping, and first degree murder. He was sentenced to death in the murder case.

The events out of which the charges arose occurred 21 August 1979. The evidence at both the guilt or innocence and penalty phases of the trial is adequately summarized in *State v. McDougall,* 308 N.C. 1. Of that introduced at the guilt phase, Justice Martin wrote:

> "After voluntarily injecting cocaine, defendant gained entry into the home of Diane Parker and Vicki Dunno by cunning, guile and misrepresentation. Once in their home, he commenced a campaign of terror against the two young women, cutting, stabbing, and slashing them with a butcher-knife. There is strong evidence that defendant killed Diane Parker while attempting to rape her. . ."

Shortly after bills of indictment were returned on 4 September 1979, defendant retained as counsel Wallace Osborne, of the Mecklenburg bar, who had practiced law in Charlotte for a number of years. Because his practice at the time was not primarily in the field of criminal law, Osborne, with the consent of defendant, associated Michael Scofield in the defense.

Scofield was experienced in the defense of major criminal cases, including capital cases. He had served as an assistant U.S. Attorney, as Public Defender for Mecklenburg County, and as a private practitioner.

The defendant stipulated at the hearing that he does not

contend there is any evidence incompetency or error upon the part of Osborne or Scofield.

Osborne and Scofield thoroughly investigated and prepared for trial. They retained the services of a psychiatrist, Dr. Stephen S. Teich; a "juristic psychologist", Courtney Mullin; a "correctional psychologist, Dr. Brad Fisher; private investigators, and other experts. They vigorously pursued discovery and appropriate motions.

Both fully appreciated the strength of the State's evidence, and the difficulty of formulating a defense when defendant suffered from amnesia as to the events. They tried to enter into plea negotiations with the State, but did not succeed.

On 27 February 1980, the defendant was sent to Dorothea Dix Hospital for psychiatric examination and evaluation of his sanity. His counsel arranged for Dr. Teich and Ms. Mullin to treat him for amnesia while there.

Both Dr. Teich and Ms. Mullin had been associated with Jerome "Jerry" Paul, who practiced law in Durham, in the defense of criminal cases, and Dr. Teich had treated Paul as a physician. They took Paul to visit the defendant at Dix, and one, or both, urged him to retain Paul.

Paul had practiced law since his admission to the bar in 1968, and represented defendants in several well publicized criminal cases, including the trial of Joan Little for murder in 1975. At that trial, Judge Hamilton Hobgood, one of North Carolina's most experienced and respected trial judges, stated that ". . . Mr. Paul is a very good lawyer and a very intense lawyer. He fights very hard and intensely for his client", prior to sentencing him for contempt. *In re Paul,* 28 N.C. App. 610, 617.

Paul had for a long time suffered from severe migraine headaches. In 1977, after the illness and death of a son, he also experienced deep depression. In May of 1979, feeling he was no longer able to practice law, he moved to New York. While there he was under psychiatric treatment by Dr. Teich, and hospitalized for migraine on several occasions.

During this period, Paul neglected his professional duties, as a result of which grievances were lodged with the North Carolina State Bar, and disciplinary procedures instituted. These were still pending at the time of his representation of defendant. (See Section III, A-1, *infra.*).

After meetings with Scofield, the defendant and his family, Paul was, with the consent of Osborne and Scofield, retained about the end of May, 1980, and designated by defendant as lead counsel.

Paul's trial technique was to use a defense "team". In addition to the three lawyers, it included Dr. Teich, who had an active role in the trial; Ms. Mullin; a paralegal; and others. Specialized services of a pollster and professor of psychology, a hypnotist, a toxicologist, and even a person to advise witnesses how to dress were also employed.

The trial began 9 June 1980. After extensive voir dire examination, a jury consisting of six white and six blacks was impaneled.

On 18 July, the jury, by special verdict, found that defendant was not insane. On 21 July, it returned guilty verdicts.

The jury, at the sentencing phase, found as aggravating circumstances that the defendant had previously been convicted of a felony involving the use of violence to the person; that the murder was especially heinous, atrocious,

and cruel; and that the murder was part of a course of conduct which included the commission of another crime of violence against another person. As mitigating circumstances it found that the murder was committed while defendant was under the influence of mental or emotional disturbance; that defendant's capacity to appreciate the criminality of his conduct or his capacity to conform his conduct to the requirements of law was impaired; and other mitigating circumstances arising from the evidence. It recommended the death penalty.

Defendant was represented on appeal by his present counsel, Mr. Fuller. The North Carolina Supreme Court found no error, and determined that the sentence was not excessive or disproportionate to the penalty imposed in similar cases. *State v. McDougall, supra.* The U.S. Supreme Court denied *cert.*, ____ U.S. ____, 78 L.Ed.2d 173.

III. DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL:

A. Paul's License to Practice Law in North Carolina:

The evidence shows that at the time of defendant's trial two disciplinary actions were pending against Paul before the Disciplinary Commission of the North Carolina State Bar. On January 21, 1980, an order was issued in 79 DHC 13, suspending him from the practice of law for 2 years. On May 23, 1980, an order of suspension for one year was entered in 79 DHC 20.

However, due to motions and appeals the orders of suspension were not effective until April 2, 1981, as shown by the order of reinstatement, filed April 13, 1984.

The defendant argues that I should disregard this, and

find that the suspensions were actually effective at the time he was retained as defendant's counsel.

N.C.G.S. 84-23 vests in the Council of the North Carolina State Bar the control of the discipline, disbarment, and restoration of attorneys practicing in the State. N.C.G.S. 84-28 prescribes the procedure for disbarment. N.C.G.S. 84-28.1 establishes a disciplinary hearing commission, which is authorized to hold hearings as to disciplinary matters, and to enter orders necessary to carry out its duties. Under N.C.G.S. 84-28, as it existed at the time of the proceedings against Paul, an attorney disbarred by an order of the Disciplinary Hearing Commission had an absolute right to appeal to the appellate division of the General Court of Justice, and discipline was stayed pending determination of the appeal.

The record of the proceedings against Paul show that he took advantage of every procedure possible to defer a final decision as to his suspension from practice. The defendant argues that I should disregard the finding of the State Bar Council, and hold that Paul's license was in fact suspended before he accepted employment in this case, or that, at least, the suspension became effective during the trial.

To do so would be to disregard the entire statutory scheme governing the disicpline of members of the bar in North Carolina, which is beyond the powers of this Court.

The fact is, that at the time Paul represented defendant, his license to practice law in North Carolina had not been suspended by reason of any action of the Disciplinary Hearing Commission which was final under the law, and, as the testimony of Scofield and the later Order of Reinstatement show, the State Bar did not consider it to be final at that time.

I therefore find that Paul, at the time he represented the defendant, was duly licensed to practice law in North Carolina.

I conclude as a matter of law, that defendant's contention that he was denied effective assistance of counsel because Paul was not licensed to practice law is without merit.

B. **Paul's Mental and Physical Condition During Trial:**

I find from the evidence that Jerry Paul had suffered from severe migraines for a number of years. As a result of the illness and death of his son in 1977, he suffered from a deep mental depression, which exacerbated the migraines.

Dr. Teich treated Paul for depression during 1979, and another physician treated him for migraine. By the end of April, 1980, Dr. Teich was of the opinion that Paul was emotionally and intellectually capable of practicing law.

Anticipating that the stress of a long trial would result in migraines, Dr. Teich, who was with Paul during the entire trial, not only himself monitored his condition, but arranged for a Charlotte neurosurgeon to oversee it.

Paul did have attacks of migraines during the trial. The evidence shows that on four occasions in June, and five in July he received treatment for the condition at the emergency rooms of Charlotte hospitals, and medications, including narcotics, were administered to him under a doctor's supervision.

Because of the migraine, Paul on one occasion requested the judge to recess court, and the request was granted. On two occasions, he was unable to conduct examination of witnesses as he had planned to do, and Sco-

field did so. At times, because of the attacks, he laid on a couch or the floor in Scofield's office. Although there is some testimony that at unspecified times he appeared to doze in court, he never appeared to his co-counsel, or to the presiding judge, to be under the influence of narcotics.

Based on this evidence, defendant contends that Paul's condition rendered his assistance ineffective.

The Supreme Court of North Carolina, in *State v. Richards,* 294 N.C. 474 (1978), considered an effectiveness of counsel claim based upon the physical disability of counsel, and said, at p. 498:

> "We think . . . that the question does not turn on the physical incapacity of counsel as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance. The reviewing court must approach such questions *ad hoc*, and in each case view the circumstances as a whole."

The United States Supreme Court has recently considered the question of constructive denial of counsel in *United States v. Cronic,* ____ U.S. ____, 80 L.Ed.2d 657 (1985). It said that under certain circumstances, such as those shown in *Davis v. Alaska,* 414 U.S. 308 (1974), and *Powell v. Alabama,* 287 U.S. 45 (1932), the likelihood that even a fully competent lawyer could provide effective assistance is so small that prejudice would be presumed. The Court made it plain, however, in footnotes 26 and 30 to that opinion, that absent such circumstances the defendant must show that specific errors of counsel undermined the reliability of the finding of guilt.

The evidence before me does not show, and defendant has not alleged, any specific error resulting from Paul's mental or physical condition. To the contrary, I find from the evidence that Paul actively and vigorously participated in the vast majority of all aspects of the trial. He conducted lengthy voir dire examination of jurors; examined and cross-examined numerous witnesses; lodged proper objections; participated in planning sessions with co-counsel; conferred with defendant; argued motions; made jury arguments; and otherwise discharged the duties of a defense counsel.

Whenever he was unable to be in court, two competent lawyers, Osborne and Scofield, were at the defense table. When he was unable to examine a witness, Scofield had sufficient opportunity to confer with the witness and effectively conduct the examination.

In argument, defendant stresses Paul's visits to hospital emergency rooms, and the nature of the medicines administered. Of the nine visits, eight were at night, one in the morning before court hours. On the day after three of the visits, the minutes show that the court was in recess. During the afternoon of June 26, 1980, on the evening of which one of the visits took place, Paul conducted lengthy examinations of witnesses upon *voir dire.*

The evidence falls far short of demonstrating that the defendant was constructively denied the assistance of counsel by reason of Paul's mental or physical condition. I find that to whatever extent it may have prevented him from participating in trial activities at specific times, two lawyers whose competence has not been attacked by defendant, fully discharged the adversarial role mandated by the Sixth Amendment during his absence.

The standard by which effective assistance of counsel is to be judged, and the guidelines to determine whether the

standard has been met, were laid down by the Supreme Court by the United States in *Strickland v. Washington,* ____ U.S. ____, 80 L.Ed.2d 674 (1985), which was decided the same day as *Cronic, supra,* and by the Supreme Court of North Carolina in *State v. Braswell,* 312 N.C. 533 (1985).

The standard is whether counsel's conduct was so deficient as to undermine the proper functioning of the adversarial system so that the trial cannot be relied upon as having produced a just result.

To establish ineffectiveness, except in cases of constructive or actual denial of counsel, the defendant must first identify the acts or omissions which are alleged not to have been the result of reasonable professional judgment. The Court must then determine whether, in light of all the circumstances, they were outside the "wide range" of competent professional assistance. Even if the Court does so determine, the defendant must then show prejudice.

The defendant here has failed to identify any act or omission by Paul which resulted from his physical or mental condition during the trial which is alleged not to have been the result of reasonable professional judgment. The only specific act he has pointed out is Paul's final argument during the sentencing phase of the trial, and there is no evidence it resulted from Paul's physical or mental condition. That contention is considered separately, *infra.*

I find that neither Paul's mental nor physical condition during the trial caused, or resulted in, any act or omission on the part of defendant's counsel which was not the result of the exercise of reasonable professional judgment, and therefore conclude as a matter of law that this contention is without merit.

C. **Constructive Denial of Counsel Arising from Paul's Conflicts of Interest:**

Defendant in his brief for the first time alleged that Paul had undisclosed conflicts of interest which resulted in a constructive denial of counsel. They are alleged to be his personal problems, his health, the pendency of disciplinary proceedings, his interest in earning fees, and in reclaiming his reputation. He argues that these considerations affected Paul's independent judgment on his behalf.

In the first place, it is difficult to fit defendant's specific allegations into what is generally considered a "conflict of interest." The cases briefed by defendant do not assist in resolving the difficulty, as they all embrace factual situations of the conventional types of conflict.

However, I find in the commentary to Sec. 3.5, *ABA Standards Relating to the Defense Function,* language to the effect that there are "subtle" types of conflict which a defense counsel must avoid, such as an opportunity to further his own personal or general social issues, or take a case because of the great publicty he expects it to attract. Although Sec. 1.1(f) of the Standards cautions that they are not intended as criteria for judicial evaluation of the effectiveness of counsel, I assume, for purposes of decision as to this contention, that such personal considerations may, under certain circumstances, constitute a possible conflict of interest.

The evidence before me does not support defendant's allegation that these conflicts, if such they be, were undisclosed. It is clear from the testimony of Mrs. Frech, defendant's mother, and of Mrs. Walls, his sister, that they had ample reason to know, from incidents during Paul's visit to them in Georgia before he was retained, that he was not well. As a result, Mrs. Frech called Scofield and inquired whether Paul was "on drugs." Scofield, after

inquiring of Dr. Teich, advised her that Paul suffered from migraines and was on medication as a result.

Scofield, having heard about the pending disciplinary actions, made inquiry of the State Bar, was told that Paul was licensed to practice law in North Carolina, and so advised Mrs. Frech.

As to Paul's concern with earning a fee, and in enhancing his reputation, if such considerations constitute conflicts of intereset, perhaps a majority of lawyers could never ethically represent any client.

The Supreme Court of the United States, in *Cuyler v. Sullivan,* 446 U.S. 335, 64 L.Ed.2d 333 (1980), held that a possibility of a conflict of interest is insufficient to overturn a criminal conviction. "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Only then will prejudice be presumed. *Strickland, supra.*

Those circumstances cited by defendant constitute, at best, only possible conflicts. The defendant has not shown a single instance in which the conflict became actual, and adversely affected Paul's performance. Prejudice cannot therefore be presumed.

The contention that pending disciplinary actions constitutes a conflict of interest was rejected by the Fourth Circuit Court of Appeals in *Roach v. Martin,* 757 F.2d 1463 (1985). The Court held that the allegation must be supported by evidence of impropriety upon the part of counsel, and rejected a *per se* rule of ineffectiveness in such circumstances.

I find that the defendant has failed to show any actual conflict of interest which resulted in any conduct upon the part of Paul which denied him effective assistance of

counsel, and conclude that this contention is without merit as a matter of law.

D. **Supervisory Power of the Court:**

As a "catch all", defendant contends that this Court, under its "supervisory powers" should order a new trial for him because of Paul's "Complete disregard for the rights of his client and lack of respect for the system of justice in this State", which rendered his trial a "travesty".

N.C.G.S. 15A-1415 sets out the grounds for appropriate relief upon a motion such as this. N.C.G.S. 15A-1420(c)(6) provides that a defendant must show the existence of the asserted ground for relief, and that relief must be denied unless prejudice is shown.

There is no doubt that the evidence at this hearing reveals that Jerry Paul during the period of his representation of defendant violated a number of the canons of the Code of Professional Responsibility of the North Carolina State Bar. By "puffing his wares" to defendant and his mother, he violated DR2-101(A), and DR2-103(A)(1) and (C), and by his statements to the media, DR7-107. Accoring to the testimony of the defendant, Paul also commited the felony of furnishing a controlled substance to an inmate of a jail, in violation of N.C.G.S. 14-258.1, and at least suggested perjury.

This Court is not vested with the authority to grant relief to the defendant solely because one of his counsel acted unethically, or even criminally. He must show, by the greater weight of the evidence, that such acts prejudiced his defense.

The evidence does not show such prejudice. What it does show is that the defendant had the assistance not only

of three lawyers, but of a number of experts in other forensic fields. The whole record demonstrates that there was a well defined, and pursued, theory of defense – insanity – which in view of the evidence as to circumstances of the crimes and defendant's apprehension thereafter, was the only reasonable one available. That it failed does not demonstrate that its pursuit was outside the range of effective representation.

The defendant argues in his brief that Paul produced, "conflict between co-counsel, turmoil in the relationship with client, and chaos among potential witnesses."

I find from the evidence that while there were serious disagreements between Paul, Osborne, and Scofield during the lengthy proceedings, arising from differing personalities, concepts of ethical behavior, and theories of defense, the three were able to communicate satisfactorily with each other, with the defendant, and with his family.

As for Paul's relation with the defendant, I find that the argument that it was "turmoil" is not supported by the testimony of the defendant. He was at the time preoccupied with the attempt to recovery his memory, and had a great deal of confidence in Dr. Teich. He frankly stated on the stand that he did not know what effect any of Paul's actions had on his trial.

The argument that Paul's conduct created "chaos" among witnesses is apparently based on the testimony of Ms. Mullin, the "juristic psychologist", and Dr. Fisher, the "correctional psychologist".

Ms. Mullin testified that, "nobody helped her to prepare to testify"; that, "the team had fallen apart"; and that her testimony was not coherent because of objections. She did not cite any specific instance in support of her conclusion.

Ms. Mullin, in an affidavit filed in the case, represented herself as a specialist in the area of jury research, juror selection, and voir dire procedures in death penalty cases; as a lecturer on those subjects before meetings of lawyers, and law students; as having been associated as advisor, coordinator, or researcher in over sixty criminal and civil cases; and as having testified as an expert in the courts of seven different jurisdictions.

She testified during the penalty stage as to her treatment of defendants' amnesia. She was not present during much of the guilt phase of the case, but returned to testify at the sentencing phase.

I find that the transcript of her testimony does not show that she was not prepared to testify. It is true that she was frequently interrupted by objections from the State, which she, as an experienced witness had no doubt encountered before. Despite this, she related to the jury in detail, at both the guilt and penalty stages, her treatment of defendant and his statements to her.

Ms. Mullin's testimony at the hearing on this motion conveyed the impression that she felt that her expert talents had not been properly utilized throughout the trial. The reason for this was revealed by Mrs. Frech, defendant's mother. She refused to pay Ms. Mullin's fee after jury selection was completed.

Dr. Fisher was first retained by Scofield and Osborne, to administer psychological tests to the defendant. He testified at the hearing that when he came to Charlotte at the trial, he was not prepared for his testimony by Paul, but did not cite any particulars.

At the guilt phase, Dr. Fisher testified at length about the tests he had administered to the defendant and gave his

conclusions based thereon. The transcript gives no indication that he was not well prepared to testify.

As with Ms. Mullin, his testimony at the hearing gave an impression that he felt he should have been accorded a more substantial role as a member of the defense "team", and suffered from a bruised ego.

After weighing and considering all of the relevant evidence, I find that the defendant has not shown by the greater weight of the evidence that Paul produced "chaos among essential witnesses".

As was pointed out by Justice O'Connor in *Strickland, supra,* the purpose of the constitutonal guarantee of effective assistance of counsel is not to improve the quality of legal representation, but to ensure that defendants receive a fair trial. It is reasonable to also infer that its purpose is not to serve as a vehicle to police the ethics of a member of the legal profession.

I find that the defendant has not shown a reasonable probability that, but for Paul's unethical, or criminal conduct, the result of his trial would have been different, or that he was prejudiced by such conduct.

Theefore, as a matter of law, I conclude that this Court has no authority to grant any relief in the exercise of its supervisory powers, or otherwise. This contention is without merit.

E. **Paul's Closing Argument at the Sentencing Phase of Trial:**

The only specific instance of Paul's performance which the defendant designates as deficient is his closing argument at the sentencing phase of the trial.

The speech was polemical – a direct, frontal attack against the death penalty. In strong language, Paul labelled it an instrument of a ruling class used against minorities, such as blacks, and to which he, as a "freedom fighter" and disciple of Martin Luther King, was vehemently opposed. It abounded with references to his personal beliefs and disbeliefs, political, social and religious, in defiance of DR7-106C(4) of the *Code of Professional Responsibility*.

The evidence reveals differing reactions to the speech. Scofield characterized it as "stupid". Allen A. Bailey, a highly competent attorney, in an affidavit filed by defendant, concluded that it was without a theme, unorganized, disjointed, without direction, offensive, "outrageous", and did not meet minimum standards of competence.

Judge Forest Ferrell, the experienced trial judge who presided at defendant's trial, found it, "as good, if not better" than other death penalty arguments he had heard. He did not find it offensive to the jury, but rather that it "called into play the conscience of the jury". He concluded his affidavit by saying:

> "It is my professional opinion, as a trial-judge who has presided over many serious felony trials and nine capital cases, that Jerry Paul's argument was appropriate, effective and well within the range of competence and expertise expected of attorneys in civil cases."

In *Rorrer v. Cooke,* 313 N.C. 338 (1985), a legal malpractice case, the Supreme Court of North Carolina said:

> "The mere fact that one attorney-witness testifies that he would have acted contrarily to, or differently from the action taken by the defendant

> is not sufficient to establish a prima facie case of defendant's negligence. The law is not an exact science but, is, rather, a profession which involves the exercise of individual judgment. Differences in opinion are consistent with the exercise of due care."

This statement is consistent with the guidelines which Justice O'Connor delineated for judicial consideration of counsel performance in *Strickland, supra.*

1. Scrutiny must be highly deferential.

2. There are no detailed rules which take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions as to how best to represent a defendant.

3. Counsel's conduct must be judged on the facts of a particular case, weighed as of the time of the conduct.

I find as a fact that at the time Paul chose to make the argument, the circumstances were these:

The defendant had been found guilty of a particularly brutal first degree murder, an equally brutal assault, and kidnapping. The State had presented evidence at the sentencing hearing that the defendant had been previously convicted of the forcible rape of a young woman, who testified at the sentencing hearing. The defendant's explanation of the crimes was voluntary ingestion of cocaine, and traumatic childhood experiences. The testimony of Dr. Teich suggested that he may, as a child, have killed his grandfather.

Six of the twelve jurors were black. Paul knew that to achieve the best possible result for defendant, a recommendation of life imprisonment, he had to convince only one juror to maintain that position. N.C.G.S. 15A-2000

(b). Scofield had told the jurors to agree on a death sentence, or there would not be one.

The evidence is undisputed that Paul intentionally framed his argument to influence black members of the panel, worked hard on it, and discussed it with Dr. Teich.

It is in the light of these circumstances that defendant's claim of ineffectiveness must be weighed.

To establish deficient counsel performance under *Strickland, supra,* the defendant must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, that is, that he did not render "reasonably effective assistance", considering all the circumstances. The Court emphasized that the fact finder must indulge a "strong presumption" that counsel's conduct does fall within the wide range of reasonable assistance, "that is, the defendant must overcome the presumption that under the circumstances the challenged action 'might be considered sound trial strategy' ".

Weighing the content of Paul's argument in the light of the *Strickland* guidelines, I cannot conclude that, under the circumstances facing him, it was conduct which was "outside the wide range of professionally competent assistance" as required by *Strickland, supra.* If, as he obviously planned and hoped, one juror had refused to join in a recommendation of death, the only possible satisfactory result would have been attained. That he did not succeed does not demonstrate that the argument constituted ineffectiveness, and the fact that the jury deliberated for seven hours before returning a verdict tends to belie the opinion of Scofield that Paul's argument was "stupid", and Bailey's that it was offensive to the jurors.

Further under *Strickland, supra,* the defendant must show that there is a reasonable probability that, but for the deficient performance, the result would have been different – a probability sufficient to undermine confidence in the result.

"When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death".

Even if Paul's argument were deemed to be ineffective assistance, defendant has made no showing of prejudice. The totality of the evidence before the jury at the sentencing stage amply supported its recommendation of the death penalty. The Supreme Court of North Carolina, pursuant to its statutory duty to consider proportionality, concluded that:

> "The transcript and record do not support the theory that this murder was the product of defendant's unfortunate childhood or a deficient personality exacerbated by the involuntary injection of cocaine."; *State v. McDougall, supra,* p. 37.

I find that Paul's closing argument at the sentencing phase of the case was, under the circumstances then existing, trial strategy which was within the range of reasonably effective assistance of counsel. I further find that the defendant has failed to show that there is a reasonable probability that, but for the argument, the finding of the jury would have been different.

I conclude, as a matter of law, that this contention is without merit.

IV. ARBITRARY AND DISCRIMINATORY APPLICATION OF THE DEATH PENALTY:

A. Proportionality of the Imposition of the Death

The North Carolina Supreme Court, in *State v. McDougall, supra,* pursuant to N.C.G.S. 15A-2000(e)(2), carefully considered the proportionality of the sentence of death imposed upon the defendant, under the procedure adopted in *State v. Williams,* 308 N.C. 47, and declined to exercise its discretion to set aside the sentence of death as disproportionate.

This contention having been determined against the defendant on direct appeal, it may not be re-litigated upon a motion for appropriate relief. N.C.G.S. 15A-1419(a)(2).

B. Submission of Second Degree Murder to Jury:

The defendant argues that the submission to the jury of a verdict of guilty of second degree murder as a lesser included offense contravened the holding of the Supreme Court of the United States in *Hopper v. Evans,* 456 U.S. 605, 72 L.Ed. 367, which held that due process requires that a lesser included instruction be given only in cases in which the evidence would have supported such a verdict.

The record in defendant's case shows that his case was submitted to the jury on both the theory of premeditation and deliberation, and felony murder. The jury found the defendant guilty of felony first degree murder, but not of premeditated first degree murder.

A possible verdict of second degree murder was submitted to the jury as an alternative to a finding of guilty of first degree under premeditation and deliberation, which

was to be answered only if the jury failed to find the defendant guilty of first degree murder upon either theory.

In this case, the evidence as to the ingestion of drugs by defendant would have supported a verdict of guilty of second degree murder, so that its submission was proper under *Hopper v. Evans, supra.*

Finally, as to this contention the defendant was in a position to adequately raise this issue upon appeal, but did not do so, N.C.G.S. 15A-1419(a)(3).

Therefore, I conclude that this contention is without merit, as a matter of law.

C. **Arbitrary and Discriminatory Application of the Death Penalty in North Carolina in General:**

This contention is based upon testimony given before another Superior Court by Prof. Samuel Gross, Associate Professor of Law, Stanford Univeristy.

Prof. Gross made a statistical study of homicides committed in North Carolina between 1 June 1977, and 31 December 1980, and testified as to his conclusions based thereon.

The State's evidence consisted of the testimony of Dr. Elliot Cramer, an expert in applied statistics, and others.

Based upon the evidence, I find the following facts:

1. Gross made an analysis of all homicides committed in North Carolina from 1 June 1977 through 31 December 1980.

2. He used as his database reports submitted by local law enforcement officials to the FBI, through the North Carolina Police Information Network. These included all homicides, classified as voluntary manslaughter, second

degree murder, and first degree murder. The reports show the race of the "suspect" and of the victim. They are never corrected or updated.

3. Using information obtained from "Death Row USA", Gross used as controls whether the homicide was committed by a stranger to the victim, whether another felony was involved in the homicide, whether there were multiple victims, the sex of the victim, the means of killing and the geographic location of the homicide.

4. Gross did not control for statutory aggravating or mitigating circumstances.

5. Gross utilized only trial court results of the cases in his database, and did not adjust for reversals of the death sentence on appeal as to 13 of the 27 defendants included in his study.

6. Gross' study was based upon numerous assumptions which he admitted are impossible to verify.

7. Using a statistical method known as "logistic regression analysis", Gross reached results upon which he based an opinion that in North Carolina the death penalty is more likely to be imposed when the victim is white than when the victim is black, and that there is a pattern of racial discrimination in the imposition of the death penalty in North Carolina.

8. The statistical method used by Gross is unreliable because of the small number of cases in the same categories, the inclusion in the database of other than first degree murders, the use of only trial court results, the lack of essential controls for statutory aggravating and mitigating factors, and because of the difficulty or impossibility of verifying logistic regression analysis based on his data.

9. Gross' study does not support his conclusion that there is a pattern of racial discrimination in the imposition of the death penalty in North Carolina.

In *McKlesky v. Kemp,* 753 F.2d 877 (11th Cir. 1985) the Court, in assessing the results of a study of the imposition of the death penalty in Georgia by Prof. Baldus which attempted to control for all the factors which are involved in a capital crime system (and which was referred to with approval by Gross), said: "Statistical analysis is useful only to show facts. They are useful to show disparate impact, less useful to show the causes of that impact, and even less useful to show intent and motivation."

The Court held that a statistical finding of disparate impact alone is not sufficient to invalidate a capital sentencing scheme, unless it is such as to compel the conclusion that race is intentionally used as a factor in sentencing.

Gross' study falls far short of this criteria. It is therefore concluded, as a matter of law, that the North Carolina death penalty statute, N.C.G.S. 15A-2000, is not applied in an arbitrary and discriminatory manner in contravention of any provisions of the Constitution of the United States, or the Constitution of North Carolina. *Gregg v. Georgia,* 428 U.S. 153 (1976), *Furman v. Georgia,* 408 U.S. 238 (1972).

I find that the death penalty in North Carolina is not imposed arbitrarily or discriminatorily in general, and conclude as a matter of law that N.C.G.S. 15A-2000, as applied, does not violate any provision of the Constitution of the United States, or the Constitution of North Carolina.

I conclude as a matter of law that this contention is without merit.

V. CONCLUSION:

Because this is a capital case, I have weighed and considered all of the evidence before me with extreme care. I have considered carefully the briefs submitted, and supplemented them with my own research.

As the defendant stated in his brief, this proceeding was principally a trial of Jerome "Jerry" Paul. Since Paul was not presented as a witness by either party – and I can well appreciate the decision of both not to call him as a witness, in view of his erratic nature as revealed by the evidence before me. The failure did result, however, in a production of Hamlet without the Prince of Denmark.

If the issue before me were the ethical and moral behavior of Jerry Paul, I would under the evidence find him guilty as charged by defendant in those respects.

That is not the issue. The question is whether Paul's transgressions resulted in the defendant's being denied his constitutional right to effective assistance of counsel. I have determined that they did not. Other aspects of his behavior must be left to another tribunal.

Upon the whole record, I find that the defendant had a fair trial. He was represented by two lawyers, Scofield and Osborne, whose competency he does not question. Long before Paul intruded himself into the case, they had made an exhaustive investigation of the evidence available to them, and thoroughly prepared for trial. Using the financial resources which were happily available to them, they enlisted the support of experts in other disciplines to assist in the defense. Exercising their best professional judgment, they weighed the evidence available to the State, and decided to attempt to negotiate a plea with the State, but could not do so. They then, again exercising their best professional judgment, decided that the trial strategy most

likely to achieve a sentence of life was to concentrate their efforts on the sentencing phase of the trial.

Whether the decision of defendant and his family to retain Paul was a wise decision is moot – they did, and designated him as lead counsel. His assessment of the case differed from that of his co-counsel. He concentrated his efforts on the insanity defense, a decision which the evidence shows was approved by defendant and his mother.

Whether adherence to the plan of original counsel would have resulted in a different sentence is an unanswerable question. Lawyers must deal with evidence as it exists – although the evidence shows that Paul attempted to concoct some. The details of the sordid crimes were irrefutable. Defendant's prior conviction of a crime of violence could not be expunged, although Paul, by filing a post conviction proceeding in Georgia, hoped to do so. The evidence as to defendant's mental condition and childhood experiences could not be changed.

The only thing of which I am convinced is that Paul's theory as to the strategy best in the interests of the defendant was within the range of reasonably effective assistance of counsel mandated by the Sixth Amendment.

The conduct of the trial itself as reflected in the record, equaled, and perhaps exceeded that of capital cases over which I have presided during some eighteen years on the Superior Court bench.

Paul, Scofield, and Osborne to the extend he participated in trial proceedings, battled the State at every step. They insured the proper functioning of the adversarial process.

In addition, because of financial resources available to him, the defendant had the benefit of a host of support

talent from disciplines other than the law. It is difficult to imagine any avenue of defense which was not utilized.

I find, as an ultimate fact, that the death penalty imposed upon the defendant did not result, in the language of Justice O'Connor in *Strickland, supra,* "from a breakdown in the adversary process that renders the result unreliable."

VI. ORDER

IT IS THEREFORE ORDERED:

1. The motion for appropriate relief is denied.

2. The Attorney General of North Carolina shall take such action with respect to the Stay of Execution issued in this case by the Supreme Court of North Carolina 26 May 1983 as he deems necessary.

3. The Clerk shall send a copy of the Memorandum Opinion and Order to all counsel of record.

This 9th day of August, 1985.

/s/ Frank W. Snepp
Frank W. Snepp
Senior Resident Superior Court Judge

APPENDIX B

No. 86A81 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* *

STATE OF NORTH CAROLINA	)	
v.	)	*From Mecklenburg*
MICHAEL VAN McDOUGALL	)	

* *

ORDER

Upon consideration of the petition filed by Defendant in this matter for a writ of certiorari to review the Superior Court, Mecklenburg County, the following order was entered and is hereby certified to the Superior Court of that County:

> "Denied by order of the Court in conference, this the 7th day of April 1986.
>
> s/ Billings, J.
> For the Court"

Accordingly, the cause is remanded to the Superior Court, Mecklenburg County. The District Attorney shall promptly calendar a hearing, as required by G.S. 15-194, to fix a new date for the execution of the original sentence.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of April 1986.

/s/ Peggy N. Byrd
J. GREGORY WALLACE
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. James C. Fuller, Jr., Attorney at Law, For the Defendant
Mr. Richard Rosen, Attorney at Law, For the Defendant
Ms. Joan Byers, Special Deputy Attorney General, For the State
Mr. Barry S. McNeill, Assistant Attorney General, For the State
Mr. Robert M. Blackburn, Clerk of Superior Court
Mr. Peter Gilchrist, District Attorney
Mr. Ralph A. White, Appellate Court Reporter

APPENDIX C

EXCERPTS FROM TRANSCRIPTS OF PROCEEDINGS

MR. PAUL'S ARGUMENT TO THE JURY:

Ladies and Gentlemen of the Jury, it comes my turn now to talk to you and basically talk to you about the death penalty. The death penalty is something that I've fought against all of my life, and that I've dedicated my career to fighting.

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: When you talk about cold-blooded killing, the most cold-blooded act of a society, the most premeditated act of a society, the most deliberated act of a society, is the death penalty. You think about that. The State asks you to kill a person after thought, after deliberation, after premeditation, and that they want the death penalty. The State asks you to go back in that jury room and take a pen similar to this one and write on a piece of paper something that no human on earth has the right to do. They ask you to write that another human being should be killed. Nobody has that right. Lawyers like myself have stood before juries for centuries. In ancient England they used to give you the death penalty for stealing a loaf of bread. They used to give you the death penalty because you would refuse to serve in the king's navy. They used to give you the death penalty because your children were hungry and you stole some clothing for them. The law, in all its majesty. The law, which is the expression of the ruling class. And in this case, the law is the expression of the ruling class, and the jury's refused to convict him. The jury's refused to carry out the order of the ruling class.

This man represents the ruling class. If there's a spoiled brat, as he talks about in this courtroom, it's him. Only a spoiled brat would get up in anger and ask you to kill. We fought a world war, World War Two, against a country that believed in killing, that had a death penalty, and after that war, there were trials. There were trials at Nuremberg, and the world decided that theere is no such thing as simply following orders and escaping guilt. The world decided that there is mass guilt, and when one of you takes that pen and takes a man's life, you all share in that guilt, and that guilt will follow you for the rest of your life. There will be no escape from it. You will take it to your grave that you participated in an act that killed another human being, and nobody has that right. Not me. Under no circumstances could I get up and ask you or –

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR.PAUL: To kill another human being, no matter what they had done, because I know the results of killing. I know that a society that kills people is a society that breeds violence. For many years, we fought the death penalty becasue the death penalty was reserved solely for –

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: – the poor and for black people.

MR. CAUDILL: OBJECTION.

MR. PAUL: and we know –

THE COURT: Just a minute. OBJECTION SUSTAINED.

MR. PAUL: And we know if they kill this white boy, we know who's next.

THE COURT: OBJECTION.

MR. PAUL: And that's why –

THE COURT: Just a minute sir. OVERRULED. Go ahead.

MR. PAUL: And that's why we have to fight it, be cause we know that the State operates with a plan. We know that that plan will require the civil rights lawyers like myself to come on down the line and fight in battles.

MR. CAUDILL: OBJECTION.

MR. PAUL: We don't have the same situation.

THE COURT: OVERRULED.

MR. PAUL: The State talks to you about the money that was spent in this case. You know who spent the most money in this case? The State did. We, the defense, didn't spend nearly what the State spent, and that's been proven in case after case. The State says that you should not have mercy. What type of person would get up and tell you, "Don't have any mercy"? I know that I only speak to a few of you. I know that in the hearts of many of you is vengeance and I know in the hearts of many of you is hatred, and I know that I have done things in this state that you disagree with, but I know now that the battles that I fought ten years ago are now in practice, and I've had people come up to me and say, "Jerry, you were right all along."

MR. CAUDILL: OBJECTION.

MR. PAUL: And I'm right about this.

THE COURT: Sir, may I rule before you finish?

MR. PAUL: Excuse me.

THE COURT: OVERRULED. Go ahead.

MR. PAUL: And I'm right about this fight. I know that fifty yers from now history will look back and they'll say, "What type of barbaric act was it that killed other people?" You see, I grew up following Dr. King. I was a student in his demonstrations, went to jail with Dr. King.

MR. CAUDILL: OBJECTION.

MR. PAUL: And I learned one—

THE COURT: Just a minute.

MR. PAUL: Excuse me.

THE COURT: OBJECTION SUSTAINED.

MR. PAUL: I learned one thing from those struggles. They taught me that no matter what the circumstances, non-violence must always oppose violence, no matter what the trouble, because if non-violence does not oppose violence, then democracy dies. We have no equal justice. The State doesn't want equal justice. The State wants to create a situation where they can go back to the way it used to be, and I know that, and I know that in this situation and in every situation, that non-violence must oppose violence because unless non-violence asserts its superiority no matter what the situation, then violence will carry the day. I know that it's the same type of people who want the death penalty who lead us into wars. I know that in every country in the history of this world where there's been a revolution, and you can name them – Nicaragua, Spain – one of the first acts that that country has done is to get rid of the death penalty because the death penalty is the tool of the Facists. The death penalty is the tool of the totalitarians. And that is a battleground that we have to fight. Had we chosen to fight Hitler in Spain, when the Facists were fighting in Spain, there would never have been World War Two, and if you don't fight Facists when they first rear their ugly head, and if you don't fight them when they want the death penalty – why do you think that Facists want the death penalty? It's because they can kill the minorities.

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR. PAUL: They can kill those who resist them. And without a death penalty, the State is without a weapon to silence those who would speak out against it, and people will tell you that I'm for social change, I'm for a different system, and that is true, and I have always been for a dif-

ferent system. I've always been for one where there's equal—

MR. CAUDILL: OBJECTION to what he's for.

THE COURT: OVERRULED.

MR. PAUL: I've always been for a system where non-violence is superior to violence and where non-violence asserts itself and proves its superiority.

You know, they talk about Mike McDougall. Remember the famous case that Clarence Darrow argued of Leopold and Leap, where two young men for the thrill of it killed, and Darrow made a plea for days — and I'm not Darrow, don't claim to be. I'm not that capable. I wish I was. For their life, because he knew—

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR. PAUL: He knew that to take their life would lessen this nation. There is not a trial lawyer, there is not a person throughout this history that we honor who wasn't against the death penalty. Why do you think that's so? It's based on experience and knowledge, and it's based on knowing the horrors of what the death penalty does to a nation and does to a people.

They didn't need the death penalty so much in the twenties and thirties because they had lynching — and we all know who they lynched — and when we fought the battle against lynching, then they came in with the death penalty, and the same people they lynched they gave the death penalty to, and that's the plan and I know it.

MR. CAUDILL: OBJECTION.

MR. PAUL: I want to read to you—

THE COURT: Just a minute. OVERRULED.

MR. PAUL: They called Clarence Darrow an attorney for the damned because he fought these cases. Often he lost, but he predicted the future for us. Let me read to you what Clarence Darrow had to say about the death penalty.

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR. PAUL: As one paragraph has as a beginning – may I get some water, Judge?

THE COURT: Yes.

MR. PAUL: I apologize for my broken voice because I'm very sad about this. This has touched me in a sad way not only for myself, for Mike McDougall, for all of us, because I know we all stand in danger, and I've seen death. I've seen death up close. As Dr. Teich told you from the stand, I had a son who died of leukemia, and I learned something very valuable from that experience. I learned tht as long as there's life, something good can come, no matter how horrible the situation, and I went through three years of that, and I know that right up until the last, that good things came, no matter how hard it was on everybody else, and I know that to kill somebody takes away that good, and if you believe – and some people do believe – that there is a God, that there is redemption, then that last moment or whatever moments or whatever time period in life, some good can come from that. That you have no right to deny another person of every ounce of life they can get because good can come from it. Many times they wanted to pull the plug on my son and kill him because they said there was no hope, and I said no, and we learned that that was a good decision because good comes from it. Love comes from it. I've seen love come from the most cruel people you've ever seen. It is possible. You don't deny that. If you're truly cynical, and the criticism of people in this country is that they're too cynical, that they don't believe that good can come, but good can come and good things can happen, if you let them. People go in the direction you push them. If you kick a man when he's down, he'll continue to go down. If you give them some hope, if you push them up, encourage them, they'll go up.

Now, I want to read to you what Mr. Darrow had to say. "I have this stand moved up so I can get next to the audience. I hope I'll not be obliged to spend too much time on my friend's address. I don't think I shall need to. First, I deny his statement that every man's heart tells him it is wrong to kill. I think every man's heart desires killing. Personally, I have never killed anybody that I know of, but I have had a great deal of satisfaction now and then reading the obituary notices, and I used to delight with the rest of my 100 percent patriotic friends when I saw them or fifteen thousand Germans being killed in a day. Everybody loves killing. Some of them think it is too messy for them. Every human being who believes in capital punishment loves killing, and the only reason they believe in capital punishment is because they get a kick out of it. Nobody kills anyone for love unless they get over it temporarily or otherwise, but they kill the one they hate, and before you can get a trial to hang someone or to electrocute them, you must first hate him, and then get satisfaction over his death. There is no emotion in any human being that is not in every single human being. The degree is different – that's all – and the degree is not always different in different people. It depends likewise on circumstances, on time, and on place. I shall not follow my friend into a library of statistics. Statistics are a pleasant indoor sport, not so good as crossword puzzles. They prove nothing to any sensible person who is familiar with statistics. I might just observe in passing that in all of the states where mortality by homicide is great, they have capital punishment, and they've always had it. A logical man, when he found out that the death rate increased under capital punishment, would suggest some other way of dealing with it. I undertook to say – and you can look them up for yourselves for I haven't had time to bother with it – I will guarantee to take any set of statistics and take a little time

with it and prove they mean exactly the opposite of what is claimed, but I will undertake to say that you can show by statistics that states in which there was no capital punishment must have a very similar smaller percentage of homi cide." In other words, he's saying in states where there's no—

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: "I know that is true. That doesn't prove anything because as a rule, there are states with less diverse population, without many large cities, such as — without as much mixture of all sorts of elements which go to add to that great gaiety of homicide as part of that. There is no sort of question but what those states of the United States where there is no capital punishment have a lower—"

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: "But that doesn't prove the question. It's a question that cannot be proven."

MR. CAUDILL: OBJECTION.

THE COURT: Approach the bench.

(There was a sidebar conference.)

MR. PAUL: "The death rate recently in the United States and all over the world has increased. Why? The same thing has happend, and has happened in every country in the world since time began. A great war always increases the death rate. We teach people to kill, and the State is the one that teaches them. If the State wishes that all citizens respect human life, then the State should stop killing. It can be done in no other way, and it will perhaps not be fully done that way. There are infinite reasons for killing. There are infinite circumstances under which there are more or less deaths. It never did depend and can never depend upon the severity of the punishment."

And so he goes on and on to argue against capital punishment. It's tough to say what is in a person's mind. I know that people do not act out of free will. That it's circumstances that bring them to a particular point. I know that out of free will, that Mike McDougall didn't go next door. That circumstance took him there. Whether or not he had the choice, whether or not he could have done different, depends upon different people at different times and different circumstances. Whether or not the D.A.'s theory is correct, the theory is born and bred in hate.

If you want to stop hate, then you must do your part to stop hate. I do know this. His grandfather killed himself. If you kill him, we know that the chances are that his daughter will kill herself, and perhaps then the circumstances of the circle will be broken. Perhaps not. We do know that you're being asked to take part in a crime against humanity.

I'm often reminded of the story of Lisa Calvalige. Lisa Calvalige grew up in Nazi Germany, and after the war, I had the privilege to meet Lisa Calvalige. Lisa Calvalige after the war met an American G.I. and they fell in love and wanted to get married, and she wanted to emigrate to this country, and before she could do so, they brought her into the Embassy and they asked her several questions and they denied to Lisa her visa or her permit to come to this country, and she inquired why. "Why was I denied the right to come to this country?" And they said, "Because you do not understand the meaning of mass guilt. You do not understand that you as a German people were responsible for Hitler. That you were responsible as a people for the atrocities committed, and to simply say you were following the law and you were following orders is not enough, because there are crimes against humanity that to say, 'We follow the law,' simply doesn't wash." So Lisa

went home and she thought upon the meaning of mass guilt and her responsibility as a person. She wasn't a soldier; she didn't work in a war factory. She was just an average, ordinary, young girl. She thought about the meaning of mass guilt, and she retook the examination. In time she was let in. She came to this country and her husband got a job with IBM, and she lived in a community outside Los Angeles, and she led a fairly normal life like most any other people, and then one day in 1968, Lisa Calvalige put on her Sunday clothes, her high-heeled shoes, white gloves, and she walked down to the port authority where they were loading napalm bombs headed for Viet Nam, and as the truck came down the street, Lisa Calvalige lay down in front of the truck so that the truck couldn't pass. She was arrested and taken to jail, and the news reporters were curious about what happened, about why such a woman would do this. So they interviewed her in the jail, and Lisa said, "Well, during World War II I was only a teenager, and my parents worked in the war factory, and I felt there was no guilt on my part, and then I began to think about mass guilt and my own guilt, and I knew that the day would come when someone would ask my children what role I had played in the killing in Viet Nam," and she said, "I knew then they could say nothing, that they didn't do anything, but the question I didn't want them to ask was, 'Where was your mother when?' "

So today I cast my vote for peace. Today I cast my vote against killing. And that is a vote we all have to cast. We all must cast a vote against killing. It has to stop. For the State to kill is an official act of violence. It teaches others to kill, and as long as the State kills, there will be other deaths. As long as the State acts in an inhuman way and doesn't hold itself up to the highest standard of humanity, and as long as the State doesn't say that non-violence must

always oppose violence, no matter what the circumstances, then we all stand in danger.

This country has an act known as the McCartle Act. It ws developed in the 1950's, and out of the McCartle Act, they created nine concentration camps, and on the order of the President, under the McCartle Act, those people who are a danger to this country may be locked up without a trial, and I think you know who is going to be locked up.

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: And that will happen unless we cast our vote for a better way, unless we vote for non-violence. You know, until justice rolls down like a mighty stream and until justice cleanses us all and until love replaces hate and until we all can sit down at the brotherhood table together and partake of the fruit of life, not of death, then when they send you back in that room with a pen and they ask you to sign a death warrant, you not only sign like Mike McDougall's death warrant; you sign all of us's death warrants, and I weep for that today because I know — I have seen it happen.

I was in Bobway sometime back in Africa to aid in the development of a new government and Golyn Moses Begun (phonetic) and the one thing that everybody agreed on was that a new nation had to make a statement to the world.

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: And that statement —

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: And the statement you have to make—

MR. CAUDILL: OBJECTION.

THE COURT: OVERRULED.

MR. PAUL: And the statement you have to make to the

world as a new nation is that the death penalty is gone. That we're looking to a better world, a better way of living, a world that the death penalty has no place in. In those countries of the world that have retained the death penalty –

MR. CAUDILL: OBJECTION.

THE COURT: SUSTAINED.

MR. PAUL: I would like to read to you now, and I'm not a person, I have to tell you, that reads the Bible, because I don't find a whole lot of answers there because I find the Bible is often diverted. As Mark Twain said, "The Bible was quoted as proof that there should be slavery, and any book that can be so misquoted, I do not prefer to use." But there is one phrase in the Bible that I have always remembered since I was a kid because it's out of that phrase that I became involved in the Civil Rights Movement. I would like to read that to you.

"In seeing the multitudes he went up into the mountains, and when he was set, his disciples came unto him, and He opened his mouth and he taught them," and I think the key word is "taught." "Blessed are they who are poor in spirit, for theirs is the kingdom of heaven. Blessed are they that mourn, for they shall be comforted. Blessed are the meek, for they shall inherit the earth. Blessed are they which do hunger and thirst after righteousness, for they shall be filled. Blessed are the merciful, for they shall attain mercy. Blessed are the pure in heart, for they shall see God. Blessed are the peacemakers, for they shall be called the children of God. Blessed are they which are persecuted for righteousness sake, for theirs is the kingdom of heaven."

One other phrase: "But I say unto you that ye resist not evil but whoever shall smite thee on the right cheek, turn to him the other also, and if any man would sue thee at the law and take away thy coat, let him have thy cloak also,

and whoever shall compel thee to go a mile, go with him three, and go give to him that asketh thee and give to him that would borrow of thee, and turn not away. You have heard that it hath been said that thou shalt love thy neighbor and hate thine enemy." That's the Old Testament, the same Old Testament that says "An eye for an eye." "But I say unto you, love your enemies. Bless them that curse you. Do good to them that hate you and pray for them that do spitefully use you and persecute you."

In all my days in the Civil Rights Movement, when I saw a person who could turn the other cheek, I knew them intimately. I never knew one who was in favor of the death penalty, not a one, and there's a reason for that. When we studied – we did a long study on Nazi Germany to discover why people would turn to Facism and turn to Nazism, and what about their psychological profile made them do that – we found that the dividing line, one of the dividing lines, the main one, was whether or not you're in favor of the death penalty and whether or not you're opposed to it and those people who were in favor of the death penalty are most apt to become Facists, and those people who are opposed to the death penalty, who will resist unjustice, they will resist Facism to the end, and they will die for it.

Another thing that I learned from non-violence is that you must lay your life on the line when another is threatened, and I have stayed awake and I have thought about this all night. I would do anything to save Mike McDougall's life. There is no doubt about that. I'll even let you kill me, and I say to you now and I say to the State, rather kill a sick person, rather than kill this man who is only twenty-three, twenty-four at the time of the crime, and in the whole history of this State, only three other people younger than he have been killed–

MR. CAUDILL: OBJECTION.

THE COURT: OBJECTION SUSTAINED.

MR. PAUL: I would say take me, because I would walk in there proud, knowing that I have saved another life, because I don't think you can hold your head up, stick your chest out, and walk with a spring in your step, proud of yourself, if you kill somebody. But I tell you what. If I die to save another man, I'll walk in there proud, because that's my job, and that's the job of any freedom fighter, and that's the job of any devotee of non-violence, and I know that I have gone on and on, and I know that some of you don't like it. And I know that some of you have already made up your mind and I feel sory for you, because if you're that inhuman, if your heart is closed that much, then you will walk away form here and you won't remember it until one day and it comes back on you, and believe me, it will come back on you, because I've seen that, too. And I've dealt with people in the non-violent struggle, the Civil Rights Movement, who are hard-hearted, and I know we have to go after them again and again, and I know somewhere in each of you there is a conscience that we can appeal to, and I know that once you let that conscience flow, and once you let that goodness that's in all of you flow, and you don't harden your heart, that you will see that love is superior to hate, and non-violence can beat violence, and we can make this a country and a state that we can all be proud of, but when the day comes when violence is superior, then we have to make other choices, but I hope and I believe that we, working together, can make non-violence superior to violence. That this is one way of doing it. This is our opportunity to do it. This is our opportunity to do as Lisa Calvalige did, cast our vote. Thank you.

Supreme Court, U.S.
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No. 85-2014

In The

Supreme Court of the United States

October Term 1985

MICHAEL VAN McDOUGALL,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

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NO. 85-2014

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

Respondent, the State of North Carolina, respectfully opposes and requests this Court to deny the Petition for Writ of Certiorari filed by Petitioner Michael Van McDougall seeking review of the judgment of the Superior Court of Mecklenburg County, North Carolina.

STATEMENT OF THE CASE

On the early morning of August 21, 1979, Petitioner Michael Van McDougall coaxed Vicki Dunno and Diane Parker to allow him into their home under the pretense that his wife had cut her leg "real bad" and needed medical attention. Once inside the home McDougall "commenced a campaign of terror against the two women, cutting, stabbing and slashing them with a butcher knife." ***State v. McDougall,*** 308 N.C. 1, 37, 301 S.E.2d 308, 329, ***cert. denied,*** 464 U.S. 865, 78 L.Ed.2d 173, 104 S.Ct. 197 (1983). There also was evidence that McDougall killed Diane Parker while attempting to rape her. The gory details of the crimes are summarized exhaustively by Justice Martin in the North Carolina Supreme Court's decision on appeal. ***Id.*** at 4-8, 301 S.E.2d at 311-13. Therefore, the State will summarize below only the evidence adduced at the evidentiary hearing on McDougall's Motion for Appropriate Relief which is relevant and necessary to an understanding of the issues he now raises for review.

A. Osborne's and Scofield's Preparation for Trial

The evidence at the evidentiary hearing tended to show the following. After McDougall's arrest, his family first hired Robert A. Karney, a Charlotte attorney, but became dissatisfied with his services.

(TEH 144-45)[1] On the advice of McDougall's employer, his family then retained Wallace Osborne. (TEH 79) Mrs. Randall Frech, McDougall's mother, agreed to pay Osborne $15,000 to represent her son on the charges. Because his practice was not primarily in the field of criminal law, Osborne, with the consent of McDougall's family, associated Michael Scofield to assist in the defense. (TEH 118, 208-09) Scofield was experienced in the defense of major criminal cases, having served as an Assistant United States Attorney in the Western District of North Carolina, as Chief Public Defender for the 26th Judicial District, and as a private practitioner. (TEH 117-18)

McDougall stipulated at the evidentiary hearing that he does not contend that there is any evidence of incompetency or error on the part of Osborne or Scofield. (TEH 4) As found as a fact by Judge Snepp, Osborne and Scofield thoroughly investigated the case and prepared for trial. "An enormous amount of preparation and work was put into the case by the defense team." (TEH 155) They investigated every possible lead that might have helped in the defense effort. (TEH 155) They retained a number of experts to assist the defense, including a psychiatrist, Dr. Stephen S. Teich; a "juristic psychologist," Courtney Mullin; a "correctional psychologist," Dr. Brad Fisher; at least three private investigators; another psychiatrist, Dr. Bacchus, from Atlanta; a Dr. Bresslar from Richmond; a chemist from Ohio who talked about pseudo-cocaine; a Dr. Jatlow from Yale University

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[1] Transcript references are to the transcript of the evidentiary hearing held in Mecklenburg County Superior Court upon McDougall's post-conviction Motion for Appropriate Relief.

who testified about the metabolic residue of cocaine remaining in the blood stream; and, John Allen, the Director of Open House in Charlotte who testified about the effect of cocaine and injecting it into the veins. (TEH 174-78) Osborne and Scofield filed an exhaustive number of motions (over 25) in the Superior Court prior to Jerry Paul's first appearance into the case.

Based on their investigation and assessment of the evidence, Osborne and Scofield both were of the opinion that "it was a foregone conclusion" that McDougall was going to be convicted and that the defense had no chance of proving McDougall was not guilty. (TEH 132, 211) According to Scofield, his proposed strategy was to put on a "polite defense" of not guilty and introduce McDougall's "mental problems." (TEH 132) Scofield did not feel that the defense had sufficient evidence to convince the jury that McDougall was insane. Both Osborne and Scofield agreed that the defense effort "should be geared toward the penalty phase and saving the man's life." (TEH 132) The problem faced by the defense attorneys was that McDougall, claiming amnesia, did not tell them what happened at the time of the crimes. (TEH 148)

In Scofield's first discussion with Mrs. Frech, he was told that McDougall was "a good boy from a good family," and that McDougall's only prior legal trouble had been "some minor misdemeanor matter in Georgia." (TEH 145) Scofield later found out that McDougall had pled guilty in Georgia to charges of rape and burglary, and that he "got some sort of ten-year sentence and served less than two years active." (TEH 151) After Osborne learned about the Georgia convictions, he raised the fee to represent McDougall.

(TEH 214-15) McDougall told Scofield that he could have beaten the Georgia charges "if he had had a fighter" to represent him. (TEH 152)

Scofield advised McDougall and his family that "it would be a victory in this case" if the defense attorneys could save McDougall's life. (TEH 152) Scofield even told Mrs. Frech that he thought McDougall was going to spend the rest of his life in prison. (TEH 153) Mrs. Frech replied that "she just couldn't stand anything more than about two years in a mental institution or something and she knew he needed help and she felt like after two years, he would be fine and should be released." (TEH 153) Because of Scofield's opinion that McDougall did not have a chance of being acquitted, McDougall's family expressed dissatisfaction with the attorneys before the trial. (TEH 146)

Osborne and Scofield approached the District Attorney's Office about whether a plea bargain might be arranged, but were told the case would be tried and that there would be no plea bargain possible. (TEH 168, 216)

In late October or early November, Scofield contacted Dr. Teich and retained his services to perform a psychiatric evaluation of McDougall. (TEH 174) Early in the case, Osborne and Scofield went to New York to meet with Dr. Teich and talk about the defense. While in New York, Dr. Teich requested that Osborne and Scofield meet with attorney Jerry Paul "to sort of get his thoughts on the case." (TEH 157) Dr. Teich later called Courtney Mullin, a juristic psychologist, and asked if she would be interested in working on the ***McDougall*** case. (TEH 34) Both Dr. Teich and Ms. Mullin had been associated with

Jerry Paul in prior criminal cases, and Dr. Teich had treated Paul as a physician.

B. McDougall Retains Jerry Paul as Lead Counsel

Because Dr. Teich was examining McDougall in anticipation of the defense attorneys raising an insanity defense, on January 30, 1980 the State moved to commit McDougall to Dorothea Dix Hospital in Raleigh for psychological evaluation by the Dorothea Dix staff. While McDougall was at Dorothea Dix Hospital during March 1980, Dr. Teich and Ms. Mullin also visited with him there. (TEH 223) McDougall first met Jerry Paul when Paul accompanied Dr. Teich and Ms. Mullin on one of their visits. Paul talked with McDougall about his background, and told him he had been involved in a number of first degree capital cases. (TEH 223-224) According to McDougall, Paul told him he had won all 150 murder cases in which he had been involved, including sixteen insanity-type cases.[2] (TEH 224) However, Paul did not talk to McDougall about being hired in McDougall's case.[3] (TEH 224) Paul wished McDougall luck and said "I hope everything comes out all right for you." (TEH 224) The next day, Ms. Mullin returned and told McDougall she was concerned about McDougall's attorneys, Osborne and Scofield. (TEH 225) She told

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[2] McDougall never introduced any evidence to contradict Paul's claim.

[3] Contrary to McDougall's misleading representation in his petition, (Petition at 6), Paul did not tell McDougall ***at their first meeting*** that McDougall's attorneys "hadn't done anything." It was only after Paul entered the case that he made disparaging comments about the other attorneys. (TEH 227) According to the evidence, Ms. Mullin was the first to make negative comments to McDougall about Osborne and Scofield, and to suggest that McDougall hire Paul.

McDougall that she did not think Osborne and Scofield had enough experience; "that they would be in over their heads"; that Dr. Teich felt the same way; and, that she thought it would be a good idea if McDougall would hire Jerry Paul. (TEH 225) McDougall replied that he would have to discuss the matter with his mother and with Scofield to see what they thought about hiring Paul. (TEH 225)

Immediately after his conversation with Ms. Mullin, McDougall used a pay phone and called his mother in Georgia. (TEH 225) He told her about meeting Jerry Paul and about what Paul had told him about winning cases. He also told her about his conversation with Ms. Mullin concerning Osborne and Scofield. Mrs. Frech said that the family would hire Jerry Paul if McDougall thought it would help, but she thought McDougall should talk to the other attorneys. (TEH 225) McDougall was discharged from Dorothea Dix Hospital back to the custody of the Mecklenburg County Jail in late March. (TEH 225-226) When he returned, McDougall called Scofield and told him that he needed to talk to him. Scofield came over to the jail and McDougall told him about the meeting with Jerry Paul. McDougall also informed Scofield that he was thinking about trying to hire Paul and asked Scofield, "Do you think you'll have any problems working with him?" (TEH 226) McDougall also said, "Look, if you tell me you can't work with this guy, tell me and we'll just stop right here." (TEH 226) Scofield replied, "Let me think about it." (TEH 226) When Scofield returned from vacation, he and Osborne met with McDougall and told him that they would have no problems working with Jerry Paul. (TEH 216, 226)

In late April 1980, Mrs. Frech and her daughter flew to Charlotte to meet with Jerry Paul, Scofield, Osborne, and Dr. Teich. Paul

told Mrs. Frech that he had been involved in numerous death penalty cases; that he knew how to conduct a capital trial; that McDougall desperately needed another attorney; that McDougall's attorneys really were not capable of preparing a death penalty case; and that if McDougall did not have other counsel, McDougall was going to lose the case. (TEH 65) Mrs. Frech asked McDougall if he wanted Jerry Paul as one of his attorneys, and McDougall answered "Yes." (TEH 65) Mrs. Frech said, "All right, Michael, if that's what you want. Its all right with us." (TEH 66) After the meeting between the attorneys and McDougall's family, Paul met with McDougall and made it clear that, "If he came into the case he would have to have control, or otherwise he would not be able to do any good." (TEH 227) Since McDougall wanted a "fighter" and was not satisfied with Osborne's and Scofield's strategy of a "polite defense," McDougall agreed that Paul would be lead counsel in the case. (TEH 227) Afterwards, McDougall told Osborne and Scofield that Jerry Paul would be lead counsel. (TEH 227) From that point forward, Paul made all major decisions in the case, (TEH 121), including the strategy of aggressively going after a verdict of not guilty, (TEH 132); whether there would be an early acknowledgment during the trial of McDougall's rape conviction in Georgia, (TEH 133); and whether McDougall would testify at the penalty phase of the trial, (TEH 134).

Jerry Paul proved to be the "fighter" that McDougall and his family wanted in the case. Jerry Paul wanted "to go real strong for a not guilty verdict." (TEH 132) Paul's trial technique was to use a "team defense," involving McDougall, his family, the three attorneys, Dr. Teich, Ms. Mullins, and others. The team defense employed the

specialized services of a pollster, a professor of psychology, a hypnotist, a toxicologist, and even a person to advise witnesses how to dress.

In mid-May, Jerry Paul visited McDougall's family in Kingston, Georgia to talk about the case. According to Mrs. Frech, upon Paul's arrival in the late afternoon, he went to the bathroom for what "must have been thirty minutes," leaving exposed on the bed a legal pad with the words "immoral mother, unfit mother." (TEH 66) Mrs. Frech admitted that she confronted Paul about the notation on the legal pad, and Paul replied "he wanted to use anything that he thought would help Michael." (TEH 83) During Paul's visit, Mrs. Frech called her daughter, Sandra Walls, telling her that there was "something wrong with Mr. Paul." (TEH 67) Paul sat down at the kitchen table to talk to Mrs. Frech and her daughter. (TEH 248) During their conversation, Paul asked if Mrs. Frech had anything sweet to eat. (TEH 67) Mrs. Frech served Paul a freshly-baked chocolate cake and a coke, and Paul ate almost half the cake. (TEH 67) According to Sandra, Paul went to sleep at the table. (TEH 248) Sandra and her mother stopped talking, looked at Paul, and Sandra said, "He's not with us anymore." (TEH 248) They nudged Paul and asked him if he was all right or needed help. (TEH 248) Paul mumbled that he was tired and needed to lie down. (TEH 67, 248) Paul went upstairs to his bedroom, while Mrs. Frech and Sandra remained in the kitchen. Later, Mrs. Frech and Sandra heard a loud crash and falling glass. (TEH 67, 248) They raced upstairs to find Paul down on his knees. (TEH 67, 248) Paul explained that he was not hurt and that he had been trying to raise the window for "a breath of fresh air." (TEH 67, 248-49) Leaving Paul to rest, Mrs. Frech and Sandra went back downstairs. (TEH 68, 249) About 9:00 p.m., Paul came down-

stairs and seemed to be all right for a period of time. (TEH 68, 249) He told Sandra that he wanted to talk to her husband, Jim Walls. Jim came over, and Paul chatted with him for a few minutes. (TEH 68, 249) Later, Paul said he was tired and sleepy, and would have to be at the airport the next morning at 8:30 a.m. When Mrs. Frech woke him the next morning, Paul seemed to be fine and ate a huge breakfast. (TEH 68) After breakfast, Mrs. Frech drove him to the airport to catch his flight. (TEH 68) During the ride, Paul started mumbling and appeared to fall asleep. When they arrived at the airport, Paul opened the car door and stumbled. (TEH 68)

When Mrs. Frech returned home, she called Scofield in Charlotte and asked him if Jerry Paul was on drugs. (TEH 69) Scofield replied, "Not that I'm aware of," but that he would check into the matter. (TEH 69) Scofield later called Mrs. Frech back and told her that he had talked to Dr. Teich about Jerry Paul. Dr. Teich told Scofield that Paul was having migraine headaches and was taking pain killers. (TEH 69)

Mrs. Frech also testified that she had "heard a little about" Paul's law license being suspended by the North Carolina State Bar. (TEH 77) When she asked Scofield about Paul's problems with the State Bar, Scofield replied that "it was just minor things" that had been taken care of, and that it was "nothing for [Mrs. Frech] to worry about." (TEH 77) Scofield testified that approximately three weeks before trial, he called a representative at the North Carolina State Bar and asked about the status of the Bar proceedings against Jerry Paul. (TEH 137) According to Scofield, the representative told him, "Fine, there's no problem. He [Jerry Paul] can participate in the trial." (TEH 137) Scofield noted that Assistant District Attorney Caudill

likewise inquired about the Bar proceedings against Paul, and was told there was no problem with Paul's law license and that he could participate in the trial. Scofield estimated that his inquiry was made around May 10, 1980, approximately three weeks before the trial started. (TEH 138) Scofield acknowledged that at the time of McDougall's trial in June, he was satisfied that Jerry Paul was licensed to practice law in North Carolina. (TEH 160)

After Jerry Paul entered the ***McDougall*** case, there were serious disagreements between counsel, often leading to "heated discussions." (TEH 38) Although Courtney Mullin testified that "[t]here was so little communication" on the defense team, (TEH 48), Scofield refuted that observation. According to Scofield, there were no communication problems between the defense attorneys, and certainly none that rendered their efforts "meaningless." (TEH 165) At the insistence of McDougall's family, Paul had decided "to go real strong for a not guilty verdict" on a Teich-based insanity defense in which McDougall would be portrayed as believing he was killing his mother. (TEH 132) Osborne and Scofield wanted to present only a "polite defense" of not guilty and introduce McDougall's mental problems at the guilt phase. (TEH 132) There were other disputes over whether McDougall's Georgia conviction would be brought out up front to avoid hurting the defense's credibility, (TEH 134), and also on the tactic of whether McDougall should testify. (TEH 134) There were other disagreements, including Paul's commenting on the case in the media, (TEH 125), and the filing of a federal lawsuit against the trial judge, Judge Ferrell. (TEH 131) On cross-examination, Scofield admitted that he himself had had a heated argument with McDougall about the filing of the lawsuit. (TEH 146) McDougall wanted

Scofield to file the lawsuit, but Scofield told him that he did not think that the lawsuit was a good idea. McDougall insisted, reminding Scofield that it was his case and he had paid for Scofield's services. (TEH 147) Scofield later signed the lawsuit but was so upset over the incident that he stayed away from the courtroom. (TEH 131, 148) However, the lawsuit incident occurred during jury selection, and the only day boycotted by Scofield was an afternoon of jury selection. Scofield was never absent during the actual trial of the case.

The transcripts show that during hearings on the pretrial motions before Paul came into the case, Osborne and Scofield both argued and participated in the hearings. Prior to Paul's first formal entry as counsel in the case, Scofield observed Paul appear to fall asleep in the courtroom. (TEH 136) However, at that time Paul was not sitting at counsel table, but was seated in the front row of the courtroom. The hearing was on the matter of McDougall's pretrial motion for an individual ***voir dire*** of the jurors. (TEH 166-67) On June 9, 1980, when the trial began with further hearings on the pretrial motions, Paul examined eight witnesses; Scofield examined ten witnesses; and, Osborne examined one witness.

On Friday, June 13, 1980, the jury selection began. Over the course of the next week, Paul handled ***voir dire*** of the prospective jurors for three days, and Scofield for two days. Osborne handled the ***voir dire*** examination of the alternate jurors. According to Courtney Mullin, Paul actively took part in the jury selection process. Both Osborne and Scofield testified that Paul did an "excellent job" on the jury selection. (TEH 166, 217)

C. The Trial

When the trial began on Monday, June 23, 1980, the State presented a total of fourteen witnesses in its case-in-chief. Scofield cross-examined eight of these witnesses, including Vicki Dunno, the survivor of McDougall's attack and the State's main witness. Paul only cross-examined four witnesses. Two of the State's witnesses were not cross-examined. According to Scofield, Paul was alert and forceful during his examination of the witnesses, and Scofield thought he did a "good job" when examining the witnesses. (TEH 165-66) Osborne also characterized Paul's examination of the witnesses as "competent and effective," and offered his opinion that "the net results were successful." (TEH 217)

Jerry Paul had suffered from severe migraine headaches for a number of years. As a result of the illness and death of his son in 1977, Paul suffered from a deep mental depression which exacerbated the migraines. (State Bar Records 118-30)4

Dr. Teich began treating Paul for depression during 1979. (State Bar Records 116). By the end of April 1980, Dr. Teich was of the opinion that Paul was emotionally, intellectually, and physically capable of practicing law. (State Bar Records 144)

Paul experienced a number of migraine headache attacks during the jury selection and trial. Nine times during the period from June 9 until July 25, 1980, Paul went to Charlotte-area hospitals for treatment of his migraine headaches, received medication for these headaches, and was then released. (TEH 181-95) The majority of the

4References to the State Bar Records are to McDougall's Exhibit #1 below, which was certified to North Carolina Supreme Court.

hospital visits were at night. Four of the visits fell on days when there was no court -- June 14, June 15, July 4, and July 20. The other visits to the hospital -- June 11, June 26, July 7, July 14, and July 16 -- when compared to the trial transcript for those days, show that Paul functioned as an active and vigorous advocate during court. The only time a headache interfered with his examination of a witness, Paul asked for and was granted a recess. According to Scofield, Judge Ferrell "on several occasions" gave the defense team a recess when Paul became ill with a headache. (TEH 162) There was no evidence that Paul was ever in court in a drugged condition. Both Osborne and Scofield testified at the evidentiary hearing that they never saw any indication Paul was under the influence of drugs. (TEH 164, 218) Osborne testified that he never saw Paul's performance as a trial lawyer affected by any apparent pain or intoxication. (TEH 218) Judge Ferrell also offered in his affidavit that he did not observe Paul to be under the influence of any drugs or other intoxicating substances. (Affidavit of Judge Forrest A. Ferrell)

On two occasions when Paul was unable to conduct the examination of witnesses as he had planned, Scofield did so in his place. (TEH 123) Although Scofield questioned whether his examinations of these witnesses were as effective as when he prepared in advance, he did indicate that he talked with each of the witnesses before they took the stand. (TEH 123-24) On cross-examination, Scofield also admitted that he had been able competently to carry on the examinations, and that he later had received a letter from one of the witnesses commending him for one of the "best cross-examinations" he had ever undergone. (TEH 161)

At the close of the State's case-in-chief, Scofield made and argued the defense's non-suit motion.

Both Scofield and Paul made opening statements for the defense. Of the defense witnesses called to testify, Paul examined eight witnesses; Scofield examined thirteen witnesses; and, Osborne examined two witnesses. Scofield also cross-examined all five of the the State's witnesses on rebuttal. On surrebuttal, Paul examined three witnesses, Scofield four, and, Osborne one. Dr. Brad Fisher was called as a witness at the evidentiary hearing to testify that he was not properly prepared for his testimony at the guilt phase of the trial. (TEH 102) However, Dr. Fisher offered no specifics as to how his testimony would have been different had he discussed it with the attorneys beforehand. On cross-examination, Dr. Fisher admitted that he had worked with Jerry Paul on a prior case, and that he had forwarded a full report on the results of his examination of McDougall to Scofield. (TEH 104, 106) Dr. Fisher also admitted that he had conferred with Dr. Teich about the results of the tests and gave his conclusions. According to Judge Snepp, "[the] transcript gives no indication that [Dr. Fisher] was not well prepared to testify." (Petitioner's Appendix A at 17a) It was Judge Snepp's impression that Dr. Fisher "suffered from a bruised ego." ***Id.*** At the conclusion of the evidence, all three defense attorneys made closing arguments to the jury.

At the penalty phase, Scofield made and argued motions prior to the presentation of evidence. Although Scofield and Paul disagreed on whether Paul should cross-examine Mary Huff, the State's first witness who testified about the crimes committed against her by McDougall in Georgia, Paul did cross-examine the witness at McDougall's request. (TEH 166) According to Scofield, "I didn't

think that he should cross-examine her at all, but I think when he did the cross-examination, it was as good, under the circumstances, as anybody could have done." (TEH 166) Paul also examined four of the defense witnesses at the sentencing phase; Scofield examined two witnesses; and, Osborne examined one witness.

Courtney Mullin testified at the evidentiary hearing that no one prepared her for her testimony at the sentencing phase of McDougall's trial, and that her testimony was "disjointed" as a result. (TEH 46) However, Ms. Mullin, an adamant opponent of the death penalty and experienced witness, admitted that she was able to relate the "substance" of her testimony to the jury and that "all the facts" were in her testimony. (TEH 59-60) Other than her feeling that her testimony was incoherent, she cited no specific instances of any deficiencies in her testimony. Judge Snepp found that the transcript of Ms. Mullin's testimony did not show she was unprepared to testify, and that she had "related to the jury in detail, at both the guilt and penalty stages, her treatment of [McDougall] and his statements to her." (Petitioner's Appendix A at 16a)

All three defense attorneys made arguments to the jury at the conclusion of the sentencing hearing. According to Osborne, the three attorneys had discussed in advance their strategy for the arguments to the jury, and had agreed that each would cover a different area. (TEH 217) Scofield testified that Paul spent "a great deal of time thinking about his closing argument and talked to Dr. Teich about it" in Scofield's presence. (TEH 164) The jury consisted of six whites and six blacks, (TEH 164-65), and Paul's argument was to be geared toward the blacks on the jury. (TEH 165) Paul discussed with Scofield his "strategic decision" to attempt to "hang-up" one of the

black jurors so that the jury would recommend only a life sentence. (TEH 179) According to Scofield, Paul specifically said, "he thought he could hang up one of the black jurors." (TEH 179)

Osborne made the first penalty phase argument to the jury. The theme of Osborne's argument centered on the irrevocability of the decision to recommend the death penalty, McDougall's redeeming qualities, and that it was not the responsibility of the jury to seek vengeance. Scofield argued next, and emphasized that each of the jurors had to make up his or her own mind about whether to recommend the death penalty, and that if the jury was unable to agree on a verdict, then McDougall would not be sentenced to death. Scofield also reviewed some of the mitigating factors that had been presented during the trial and sentencing hearing. Scofield further argued that sentencing McDougall to life in prison would cause McDougall to die "a slow death."

Assistant District Attorney Caudill next argued to the jury in favor of a recommendation of the death penalty. Caudill's argument was interrupted on several occasions by objections from Scofield and Paul.

Paul had the last argument to the jury during the penalty phase. (Petitioner's Appendix C) Paul's argument had been carefully planned, and his emphasis, which he discussed with Dr. Teich, Osborne, and Scofield, was to "hang up" the jury by reaching one of the black jurors.

Charlotte attorney Allen A. Bailey, on the basis of reading the closing arguments, offered his opinion by affidavit that Paul's argument was "insulting, disjointed, and below the standard of practice in

criminal cases." (Affidavit of Allen A. Bailey) However, Bailey admitted that he was not present at the trial and had not read the transcript of the trial. Judge Ferrell, who presided over the trial and who has heard at least nine capital cases, stated the following about Paul's argument:

> Jerry Paul's delivery of his jury argument during the penalty phase was as good as, if not better, then the majority of death penalty arguments I have heard. He was matter of fact and "homey". He had a flowing argument, at times passionate, but always respectful in the sense that I could see nothing offensive to the jury by his mannerisms, the techniques he employed, or the content of his argument. He effectively presented an argument which called into play the conscience of the jurors. I perceived his remarks about his work with Dr. Martin Luther King as a way to establish his credentials with the jury as a personality philosophically opposed to the death penalty generally. In my opinion, Mr. Paul's comment that "If there's a spoiled brat, as he talks about in this courtroom, it's him. Only a spoiled brat would get up in anger and ask you to kill," was an appropriate response to the prosecutor's having just called McDougall a spoiled brat in his jury argument. Paul's argument dealt with the theme that the jurors should reject the death penalty as being generally wrong and dangerous to some of the jurors' self-interest. Mr. Osborne and Mr. Scofield by their arguments had already argued why they felt the death penalty was wrong specifically in this case. The three defense arguments

> meshed, in my opinion, to present to the jury the significant points against imposing the death penalty on Michael McDougall. The jury deliberated almost seven hours before returning a recommendation of death.
>
> It is my professional opinion, as a trial judge who has presided over many serious felony trials and nine capital cases, that Jerry Paul's argument was appropriate, effective, and well within the range of competence and expertise expected of attorneys in criminal cases.

(Affidavit of Judge Forrest Andrew Ferrell at 3)

REASONS THE WRIT SHOULD NOT ISSUE

I.

THE STATE COURTS PROPERLY DECIDED McDOUGALL'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN ACCORDANCE WITH *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 80 L.ED.2D 674, 104 S.CT. 2052 (1984), SINCE THE UNIQUE FACTS OF THE INSTANT CASE ARE NOT AMENABLE TO THE NARROW PRESUMPTION OF A SIXTH AMENDMENT VIOLATION NOTED BY THIS COURT IN *UNITED STATES V. CRONIC*, 466 U.S. 648, 80 L.ED.2D 657, 104 S.CT. 2039 (1984); THEREFORE, PETITIONER HAS FAILED TO DEMONSTRATE ANY COMPELLING REASONS WHY THIS COURT SHOULD REVIEW THE STATE COURT'S DECISION BELOW.

Obviously recognizing that he cannot meet the prejudice requirement for ineffectiveness of counsel claims under ***Strickland v. Washington***, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), Petitioner now seeks the issuance of a writ of certiorari from this Court on the ground that only his death sentence should be reviewed because Jerry Paul's overall representation of him compels the presumption of prejudice recognized by this Court in ***United States v. Cronic***, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984). In support of this argument, Petitioner highlights his allegations that Paul twice was the subject of suspension orders by the North Carolina State Bar shortly before his trial; that during his trial Paul made visits to area hospital emergency rooms seeking treatment for his migraine headaches, and ingested a number of narcotic drugs; that Paul allegedly engaged in illegal and unethical behavior during his representation of Petitioner; and that Paul delivered an incoherent and offensive argument to the jury at the end of the sentencing phase of the trial. The State court rejected these arguments and instead subjected Petitioner's ineffectiveness allegations to the ***Strickland*** analysis. (Petitioner's Appendix A at 6a-21a) Petitioner does not allege or show that this decision is in conflict with other state or federal cases, and has proffered no other compelling reasons for this Court, in its discretion, to review this case. Supreme Court Rule 17.1. Moreover, a brief review of Petitioner's allegations confirms the conclusions of the State courts that relief is not warranted under the unique facts of this case.

A. Paul's Disbarment

Despite conceding the State court's finding of fact that Jerry Paul, one of the three privately-retained attorneys hired by his family,

was duly licensed to practice law in North Carolina at the time of his trial, (Petition at 13), Petitioner persists with his myopic argument that Paul nevertheless "had actually been ordered suspended from practice at the time of petitioner's trial," and that such disbarment invokes the ***Cronic*** presumption of prejudice. It is true that in January and again in May of 1980 the North Carolina State Bar issued orders suspending Paul from practicing law due to neglect of his obligations to certain clients. (Petitioner's Appendix A at 6a) However, as noted and found as a fact by the State court, due to Paul's motions and appeals of right the suspension orders did not become effective until April 2, 1981, almost a year after Petitioner's trial. At the time of Petitioner's trial in June and July of 1980, Paul in fact still was duly licensed to practice law in North Carolina, and the finding of this historical fact is supported by the record. Indeed, both co-counsel Scofield and Assistant District Attorney Caudill had confirmed with the State Bar that there was no problem with Paul's law license and that he could participate in the trial. (TEH 137-38).

While it may be true ***arguendo*** that the Sixth Amendment guarantee of counsel means representation by an attorney licensed to practice law, ***see. e.g., United States v. Hoffman***, 733 F.2d 596, 599 (9th Cir.), ***cert. denied***, ___ U.S. ___, 83 L.Ed.2d 409, 105 S.Ct. 521 (1984), the suspension of an attorney from practice before his or her state bar does not automatically result in a lack of representation by counsel or a ***per se*** Sixth Amendment violation. ***Roach v. Martin***, 757 F.2d 1463, 1479-80 (4th Cir.), ***cert. denied***, ___ U.S. ___, 88 L.Ed.2d 154, 106 S.Ct. 185 (1985) (no prejudice presumed where lead counsel was under investigation for disbarment at time of trial); ***United States v. Hoffman, supra*** at 599-600 (defendant's representation by attorney

who was suspended from his home state bar during federal district court trial was not ***per se*** Sixth Amendment violation); ***United States v. Sielaff***, 542 F.2d 377, 380 (7th Cir. 1976) (subsequent disbarment of counsel was irrelevant to his performance at trial); ***Hernandez v. Wainwright***, 634 F.Supp. 241, 246 (S.D.Fla. 1986) (counsel's disbarment five years after defendant's conviction did not render representation automatically deficient.

Here, at the time of Petitioner's trial Paul was duly licensed to practice law in North Carolina, and his disbarment did not become effective until almost a year later. Moreover, Petitioner totally ignores the fact that he was represented by two other attorneys, Osborne and Scofield, throughout his trial. Neither the competence nor law licenses of these attorneys are challenged by Petitioner. The availability of such a defense team of attorneys easily distinguishes this case from the few decisions in which courts have applied a ***per se*** rule and found that the right to counsel was violated. ***Compare Solina v. United States***, 709 F.2d 160, 168 (2d Cir. 1983) (defendant unknowingly represented by law school graduate who had failed the bar examination twice and had not been admitted to any other bar); ***Harrison v. United States***, 387 F.2d 203, 212-14 (D.C. Cir. 1967) (one defendant's conviction reversed because government used statements elicited earlier during trial when the defendant was represented by an ex-convict posing as a lawyer), ***rev'd on other grounds***, 392 U.S. 219, 20 L.Ed.2d 1047, 88 S.Ct. 2008 (1968); ***Huckelbury v. State***, 337 So.2d 400 (Fla. Dist. Ct. App. 1976) (law school graduate had been refused admittance to Florida State Bar for failure to meet standards of character and was not a member of any other bar).

Therefore, under the present facts, the mere fact that orders of suspension had been issued against Paul did not result in a ***per se*** Sixth Amendment violation. Petitioner cites no controlling precedent for such a ***per se*** rule, and has not shown the State court's decision to the contrary to be in conflict with any applicable federal or state decisions.

B. Paul's Migraine Headaches

Petitioner also complains that Paul was physically incapacitated by migraine headaches and narcotic drugs during the trial, and therefore the ***Cronic*** presumption of prejudice should be applied. However, an attorney's physical condition or ingestion of drugs is not in itself enough to constitute a ***per se*** Sixth Amendment violation. ***See, e.g., Berry v. King***, 765 F.2d 451, 454 (5th Cir. 1985) (fact that attorney used drugs during trial was not solely determinative of ineffective assistance of counsel claim); ***Young v. Zant***, 727 F.2d 1489, 1492 (11th Cir. 1984), ***cert. denied***, ___ U.S. ___, 84 L.Ed.2d 390, 105 S.Ct. 1371 (1985) (Petitioner's observations that counsel ingested drugs during trial did not automatically support claim of constitutional ineffectiveness). The critical inquiry, as properly determined by the State court, is whether under ***Strickland, supra***, regardless of the cause, Paul's representation of Petitioner was deficient and whether this deficiency prejudiced Petitioner.

Petitioner clearly failed to make the required showing under ***Strickland***. The evidence does not show, and Petitioner has not identified, any specific error resulting from Paul's mental or physical condition. On the contrary, the State court found that

> Paul actively and vigorously participated in the vast majority of all aspects of the

> trial. He conducted lengthy ***voir dire*** examination of jurors; examined and cross-examined numerous witnesses; lodged proper objections; participated in planning sessions with co-counsel; conferred with defendant; argued motions; made jury arguments; and otherwise discharged the duties of a defense counsel.

(Petitioner's Appendix A at 10a) Moreover, whenever Paul was unable to be in the courtroom, both Osborne and Scofield were at the defense table and fully discharged the adversarial role in Paul's absence. On the occasions when Paul was unable to examine a witness, Scofield had adequate opportunity to confer with the witness and effectively conduct the examination. (Petitioner's Appendix A at 10a) Although Petitioner emphasizes Paul's visits to area hospital emergency rooms and the drugs prescribed for Paul, the State court found that all but one of these visits were at night, and that on the day after three of the visits the trial court was in recess. (Petitioner's Appendix A at 10a) "During the afternoon of June 26, 1980, on the evening of which one of the visits took place, Paul conducted lengthy examinations of witnesses upon ***voir dire***." (Petitioner's Appendix A at 10a) Despite some testimony that Paul appeared to doze in court, he never appeared to his co-counsel or the presiding judge to be under the influence of narcotics. (Petitioner's Appendix A at 9a).

Therefore, the State court properly applied ***Strickland*** in concluding that Petitioner did not receive ineffective assistance of counsel because of Paul's migraine headaches and ingestion of drugs during the trial. Paul's headaches and drug use are not enough to constitute a ***per se*** Sixth Amendment violation.

C. Paul's Ethical Violations

Contrary to Petitioner's argument, this case does not provide this Court with a compelling opportunity to define the relationship between canons of ethics and the Sixth Amendment. The State court found that during his representation of Petitioner Paul had violated a number of canons of the Code of Professional Responsibility of the North Carolina State Bar, and also may have committed a felony by furnishing drugs to Petitioner or suggesting perjury. (Petitioner's Appendix A at 14a) However, the State court held that, under ***Strickland***, Petitioner had failed to show that such acts prejudiced his defense.

> The evidence does not show prejudice. What it does show is that the defendant had the assistance not only of three lawyers, but of a number of experts in other forensic fields. The whole record demonstrates that there was a well defined, and pursued, theory of defense-insanity-which in view of the evidence as to circumstances of the crimes and defendant's apprehension thereafter, was the only reasonable one available. That it failed does not demonstrate that its pursuit was outside the range of effective representation.

(Petitioner's Appendix A at 14a-15a) Likewise, this Court recently held that "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." ***Nix v. Whiteside***, 475 U.S. ___, ___, 89 L.Ed.2d 123, 134, 106 S.Ct. 988, 994 (1986). Given the facts of this case, including the absence of any prejudice to the defense as a result of Paul's actions, review of Petitioner's allegations about Paul's ethical violations is not warranted.

D. Paul's Sentencing Argument

Finally, as in the State court below, the only specific aspect of counsel's performance which Peitioner challenges is Paul's closing argument at the sentencing phase of the trial. (Petitioner's Appendix C) Petitioner complains that the argument was a "disjointed and patently offensive oration" which demonstrates that Paul was impaired. On the contrary, the State court found that "[t]he evidence is undisputed that Paul intentionally framed his argument to influence black members of the [jury] panel, worked hard on it, and discussed it with Dr. Teich." (Petitioner's Appendix A at 20a) Paul's emphasis, which he discussed with Dr. Teich and Scofield, was to hang up the jury by reaching one of the black jurors. Indeed, even the jury ***voir dire*** questions by Paul show that he was setting this strategy as he picked the jury. Until he was stopped by the trial court, Paul attempted to educate the jurors about the death penalty's alleged historical use against blacks and lack of a deterrent effect. Moreover, Paul tried to remind the black jurors that the ruling class (i.e., the whites) would use the death penalty as a tool to control them.

When integrated with the arguments of Petitioner's other attorneys, Osborne and Scofield, the inescapable conclusion is that sparing McDougall's life was addressed from every possible angle. Osborne and Scofield argued to the jury the mitigating, religious, and personal reasons for the jury not to recommend the death penalty. Scofield even improperly emphasized the effect of a deadlocked jury, which clearly helped to set up Paul's theme that the black jurors should protect their own self interests by recommending life imprisonment rather than the death penalty. Therefore, the State court correctly held that under ***Strickland, supra***, Paul's closing argument at the sentencing

phase of the trial was not unreasonable and that Petitioner had failed to show any prejudice as a result. (Petitioner's Appendix A at 21a) Nothing about the State court's decision regarding Paul's argument warrants review on ***certiorari***.

II.

SINCE THE INSTRUCTION ON SECOND-DEGREE MURDER WAS SUPPORTED BY THE EVIDENCE AND PETITIONER WAS CONVICTED ONLY OF FIRST-DEGREE MURDER UNDER THE FELONY-MURDER RULE, THE FORMER NORTH CAROLINA PRACTICE OF AUTOMATICALLY INSTRUCTING THE JURY ON SECOND-DEGREE MURDER IN CAPITAL CASES OF PREMEDITATED AND DELIBERATED FIRST-DEGREE MURDER DID NOT PREJUDICE PETITIONER, AND THEREFORE, DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL IMPORTANCE WARRANTING REVIEW BY *CERTIORARI*.

Petitioner next attempts to concoct an issue worthy of ***certiorari*** by arguing that under ***Roberts v. Louisiana***, 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001 (1976) and ***Hopper v. Evans***, 456 U.S. 605, 72 L.Ed.2d 367, 102 S.Ct. 2049 (1982), the capital punishment procedure in effect in North Carolina at the time of his trial violated the Eighth and Fourteenth Amendments because juries in capital cases of premeditated and deliberated first-degree murder were always instructed to consider a verdict of second-degree murder, even if there was no evidence to support such a verdict. However, as noted by the State court, Petitioner failed to raise this issue on his direct appeal to the North Carolina Supreme Court thereby waiving this issue under N.C.G.S. §15A-1419(a)(3) (1983). (Petitioner's Appendix A at 23a)

Although the State court proceeded to find this issue to be without merit as a matter of law, its express reliance on the procedural bar precludes federal review regardless of its alternative discussion of the merits. ***Davis v. Allsbrook***, 778 F.2d 168, 176 (4th Cir. 1985). ***See Wainwright v. Sykes***, 433 U.S. 72, 81, 53 L.Ed.2d 594, 604, 97 S.Ct. 2497, 2503 (1977) (adequate and independent state ground for decision bars review in federal courts).

Moreover, any error in the instruction on second-degree murder was harmless. ***See Rose v. Clark***, ___ U.S. ___, 54 U.S.L.W. 5023 (July 2, 1986). The first-degree murder charge in Petitioner's case was submitted to the jury on both theories of premeditation and deliberation, ***and*** the felony-murder rule. (Petitioner's Appendix A at 22a) The jury found Petitioner guilty of first-degree murder based only on the felony-murder rule. The possible verdict of second-degree murder was submitted to the jury as an alternative verdict to first-degree murder based on premeditation and deliberation, which was to be answered only if the jury failed to find Petitioner guilty of first-degree murder under either theory. (Petitioner's Appendix A at 22a-23a) In addition, as a matter of State law, the evidence as to Petitioner's ingestion of drugs would have supported an instruction on second-degree murder. ***State v. Kirkley***, 308 N.C. 196, 222, 302 S.E.2d 144, 159 (1983) (second-degree murder instruction properly submitted where defendant offered evidence of his intoxication and mental disorders). Therefore, the practice overruled by the North Carolina Supreme Court in ***State v. Strickland***, 307 N.C. 274, 289-90, 298 S.E.2d 645, 655-56 (1983), did not prejudice Petitioner in any way, and review by ***certiorari*** is not warranted. ***See Hopper v. Evans***, 456 U.S. at 613-14, 72 L.Ed.2d at 374-75, 102 S.Ct. at 2054 (mere

existence of Alabama preclusion law did not render death penalty statute unconstitutional).

CONCLUSION

Neither of the issues presented by Petitioner raises a substantial federal question deserving of this Court's discretionary review. The State court's decision is not in conflict with any other federal or state cases, and, on the unique facts of this case, there are no other special and important reasons for this Court to grant review by writ of certiorari. Accordingly, Respondent, the State of North Carolina, respectfully requests that the Petition for Writ of Certiorari be denied.

This the 23rd day of July, 1986.

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